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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO, LOCAL NO. 243,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Labor Board v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956), this Court ruled that while "[n]o [general employer] restriction may be placed on the employees' [National Labor Relations Act] right to discuss self-organization among themselves . . . no such obligation is owed nonemployee organizers" and that an "employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message." *Id.* at 112. The Court "reaffirm[ed] that general rule" in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). The question presented here is:

Did the National Labor Relations Board err as a matter of law in reading *Lechmere* to require the Board to apply the *Babcock-Lechmere* rule in cases arising *outside* of the organizing context, in which already-organized employees seek to exercise their NLRA right to engage in concerted activity for their mutual aid or protection by distributing handbills to consumers on property that is open to the public generally but that is owned by a business which is not the employees' immediate employer? *

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* Macomb Mall Associates was one of the respondents before the National Labor Relations Board and was an intervenor in the Court of Appeals and thus is a respondent here. (Sears, Roebuck & Co. and Oakland Mall Ltd. also were respondents before the NLRB but they did not participate in the proceedings below). In addition, this case was consolidated for decision below with *United Food and Commercial Workers Local 880 v. NLRB*, D.C. Cir. No. 95-1123. The parties to the proceeding below thus included, in addition to the parties listed in the caption to this petition, Local 880 of the United Food and Commercial Workers.

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PETITION FOR A WRIT OF CERTIORARI

Local 243, International Brotherhood of Teamsters, AFL-CIO, petitions this Court to issue a writ of certiorari to enable the Court to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit in *Food and Commercial Workers Local 880 v. NLRB* and *Teamsters Local 243 v. NLRB*, 74 F.3d 292 (D.C. Cir. Nos. 95-1123 & 95-1260, Jan. 26, 1996).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is officially reported at 74 F.3d 292, and is reprinted in the separately-bound Appendix to the Petition ("Pet. App.") at 1a-17a. The Supplemental Decision and Order of the National Labor

Relations Board at issue in this matter is officially reported at 316 NLRB 1160, and is reprinted at Pet. App. 18a-67a. The original decision of the NLRB in this matter is officially reported at 304 NLRB 832, and is reprinted at Pet. App. 68a-80a.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was issued on January 26, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 7 and 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 157 & 158(a)(1), provide in pertinent part as follows:

> [Sec. 7] Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . .
>
> [Sec. 8(a)] It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this Act.

STATEMENT OF THE CASE

Statement of Facts

This case arises out of an unfair labor practice charge filed by petitioner Teamsters Local 243 ("the Union") against Sears, Roebuck & Co. and two malls in Michigan in which Sears maintained retail stores. The relevant facts are as follows.

At all times material here the Union was the representative of a unit of truck drivers employed by Ryder

DPD, a trucking firm. In July 1988, Sears canceled its contract with Ryder and replaced Ryder with Leaseway Trucking, a non-union, sub-standard firm. As a result of losing its contract with Sears, Ryder laid off upwards of 100 drivers, only a few of whom were hired by Leaseway. Pet. App. 20a, 38a.

In response, Teamsters Local 243 prepared a handbill for the laid-off drivers to distribute to would-be-customers of Sears urging them not to patronize Sears until Sears once again contracted with Ryder. The handbills, which were directed solely to Sears' customers, stated [Pet. App. 21a]:

ATTENTION SHOPPERS

PLEASE do not shop at this . . .
Sears and Roebuck Store!

Sears no longer uses a Company that employs Local 243 Members to deliver merchandise.

As a result, (100) One Hundred Members of Local 243 have lost their jobs. Our Members need your help to get their jobs back.

Thank you . . . .
Teamsters Local 243

On August 2, 1988, six laid-off Rider employees, accompanied by one union representative, began to distribute the handbill at Sears' store in the Oakland Mall in Troy, Michigan. The employees did so at two of the eight exterior entrances to the store and at the one mall entrance to the store; each location was on Sears' property. Pet. App. 22a.

On August 9 and 10, 1988, and again on September 7, 1988, the laid-off employees sought to distribute the same handbills at another Sears' store in the Macomb Mall in Roseville, Michigan. There the handbills were distributed at the mall entrance to the store on mall property and at three exterior entrances to the store on Sears' property. Pet. App. 23a, 24a.

No signs were carried or displayed, and there was no picketing at either store on any occasion. The Administrative Law Judge found that, as instructed, the handbillers stayed at their designated location, permitted free ingress and egress, and limited themselves to politely asking customers to speak to Sears' management on the employees' behalf. Pet. App. 38a.

Notwithstanding the peaceful and non-disruptive nature of the handbilling by the laid-off Ryder employees, on each occasion the employees attempted to distribute the handbills they were forced to leave by Sears and/or mall management. Pet. App. 22a, 24a-25a.

Prior Proceedings

The Teamsters filed unfair labor practice charges against Sears and the two malls (collectively referred to here as "Sears") alleging that Sears had violated § 8 (a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) ("NLRA" or "the Act"), by preventing the laid-off employees from distributing handbills to Sears' customers on property owned by Sears. In a decision issued August 27, 1991, the National Labor Relations Board ("NLRB" or "the Board"), applying the then-current test for evaluating such claims as set forth in *Jean Country*, 291 NLRB 11 (1988), ruled that Sears had violated the Act.

Sears filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit and the Board filed a cross-application for enforcement of its order. While the case was pending, this Court decided *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), holding that the NLRB's *Jean Country* approach to resolving property access cases, "at least as applied to non-employee organizational trespassing," is not "consistent with out interpretation of § 7. 502 U.S. at 536."

Following *Lechmere,* on joint motion of the parties this case was remanded to the Board for reconsideration. The Board, on remand, invited the parties in this case, as well as the parties in a number of other like cases, to submit supplemental statements of position on the implications of *Lechmere.*

On January 25, 1995, a closely divided Board issued its decision in *Leslie Homes, Inc.,* 316 NLRB 123, *pet. for review denied sub nom. Metropolitan Dist. Council of Carpenters v. NLRB,* 68 F.3d 71 (3d Cir. 1995).[1] By a 2-1-2 vote, the Board ruled that *Lechmere* "applies . . . outside the organizing sphere," Pet. App. 93a, to cases in which organized employees seek to exercise their NLRA § 7 right to engage in "concerted activities . . . for . . . mutual aid or protection" by distributing handbills to customers of a non-union competitor which is paying substandard wages and benefits to its employees.

Writing for the majority, Members Stephens and Cohen —while acknowledging that "*Lechmere* addressed only the right of nonemployees to organize on an employer's property"—nonetheless could "discern no reason to assume that [the Court] would apply [*Lechmere*'s] reasoning only in organizing cases," and could find "no . . . signal in *Lechmere*" that the Court intended such a limitation. Pet. App. 94a-95a. Chairman Gould, in a concurring opinion by which he "join[ed] . . . in the majority opinion," agreed with Members Stephens and Cohen that "*Lechmere* resolves the issue definitively." *Id.* at 107a-108a. Chairman Gould added:

> [L]ike the majority, I am of the view that *Lechmere* creates no distinction and sends no "signal" that union efforts to reach customers and the public ought to be treated differently from the initiatives undertaken in *Lechmere* itself. Under the circum-

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[1] For the Court's convenience, we have reprinted the NLRB's decision in *Leslie Homes* at Pet. App. 81a-117a.

> stances of this case, the reasoning employed in *Lechmere* applies. Pet. App. 108a.

Three months after deciding *Leslie Homes*, a divided Board issued its decision in the instant case dismissing the complaint. The majority, consisting of Members Stephens and Cohen, viewed *Leslie Homes*' interpretation of *Lechmere* as determinative in all cases in which the employees seeking to exercise their § 7 rights are not employed by "any of the employers where property interests are at issue." Pet. App. 27a n.12.

Member Truesdale, who had dissented along with Member Browning in *Leslie Homes*, dissented here as well, reiterating his "belie[f] that *Lechmere*'s rationale is properly limited to nonemployee organizational activity on an employer's private property." Pet. App. 31a.

The Union petitioned the United States Court of Appeals for the District of Columbia Circuit to review the decision of the NLRB. That petition was consolidated with a petition filed by Local 880 of the United Food and Commercial Workers seeking review of a separate decision of the NLRB raising the same legal issue.

On January 28, 1996 the court of appeals issued its decision herein, "agree[ing] with the Board that, although *Lechmere* does not purport to decide the precise questions at hand in these cases, the Court's rationale in *Lechmere* disposes of the issues raised by petitioners." Pet. App. at 4a.

REASONS FOR GRANTING THE WRIT

This case presents a question that by its nature only this Court can answer: the meaning—and in light of that meaning the governing scope—of the Court's decision in *Lechmere, Inc. v. NLRB, supra.*

From the NLRA's first contentious days in this Court through *Lechmere,* no set of issues has proved more contentious than the one generated by the conflict between state property law, which in general grants property owners the right to control the activities that take place on their property, and NLRA § 7, which declares that "employees shall have the right" to engage in certain protected activities.

And, from *Republic Aviation Corp. v. Board,* 324 U.S. 793 (1945) through *Labor Board v. Babcock & Wilcox,* 351 U.S. 105 (1956) and on to *Lechmere,* this Court has returned to one aspect of this conflict: efforts by employee union organizers and nonemployee union organizers to exercise the § 7 right of "self-organization" within the workplace. It is common ground that *Lechmere,* in terms, provides a definitive resolution of that issue and, to that extent, brings legal order out of what had been forty years of disorder.

But the union organizing cases have never posed the only conflict between property rights and NLRA § 7 rights. The Act creates not only the right of "self-organization" that is at the center of the *Republic Aviation—Babcock—Lechmere* trilogy, but also the right of organized employees to "engage in concerted activity for the purposes of collective bargaining or other mutual aid or protection." And, as here, the exercise of those rights in the form of picketing and handbilling on privately-owned property raises what has been recognized from the first to be a distinct—and distinctly important—set of legal questions.

Although this Court has not even purported to resolve those questions, the NLRB, in a 2-1-2 decision, has now

read *Lechmere* to provide an authoritative answer and to hold that employees may be precluded from exercising their § 7 right to engage in concerted activity on property that is open to the public generally if that property is owned by someone other than the employees' immediate employer.

The practical consequences of that reading of *Lechmere* are profound. As the instant case—and as the large number of other cases raising this issue confirm, *see* pp. 14-15 *infra*—organized employees often find their wages, and even their jobs, threatened by what other employers do in the marketplace. Recognizing this, the Act grants employees the right to defend their labor standards and their jobs by enlisting the aid of customers of the offending employer in an effort to exert economic pressure on that employer. But as the Board majority now interprets *Lechmere*, what the NLRA grants with one hand it takes back with the other, allowing employers like Sears to prevent handbilling outside Sears' stores, the only place where Sears' would-be-customers can be found.

Unless the Court grants *certiorari* here, the Board majority's reading of *Lechmere*—and the Board rule subordinating the NLRA § 7 "mutual aid or protection" rights of organized employees— will become the law by default (since the NLRB's General Counsel has exclusive authority to bring unfair labor practice cases and the General Counsel is bound by settled Board law in exercising his prosecutorial authority). Thus, this is a situation in which there is no room for litigation elucidaton. The first request for review will also necessarily be the last.

Had the Board majority formulated the rule at issue here based upon its industrial expertise and in the exercise of its administrative discretion, the Court might well be justified in allowing that rule to stand unreviewed. But that is most emphatically not what has happened. Rather, the Board majority concluded that *Lechmere* dictated the

governing rule and that *Lechmere* thereby foreclosed the Agency from bringing its expertise to bear and from exercising any discretion.

Similarly, had the Board majority done business with *Lechmere* in a manner that stills criticism, its decision would command respect. But, as we show below, *Lechmere*'s holding regarding "nonemployee union organizers" rests on a logic that applies only to such organizers—*viz.*, that, properly construed, "§ 7 simply does not protect nonemployee organizers." *See* pp. 17-20 *infra*. By ignoring *Lechmere's* carefully wrought—and carefully explained—interpretation of the NLRA's text and structure and by extending *Lechmere*'s holding to cases in which it is plain beyond doubt that § 7 *does* provide protection, the Board has stretched *Lechmere* well beyond the breaking point.

As matters now stand, then, the rule at issue here does not rest on the Act itself, or on this Court's decisions elaborating on the Act, or on Board decisions treating with the distinct legal question presented here on its own merits, but rather on a 2-1-2 Board decision which pushes *Lechmere* through the wall. Especially given the stakes, the evolution that began in *Republic Aviation* and that has progressed through a complex dialectic to *Lechmere*, should not be put to an end through the use of main force, rather than the force of reason.

Because this request for review is, as just explained, so closely bound up with the correct reading of *Lechmere*, our petition proceeds as follows. We first review the decisions that led up to *Lechmere* both in this Court and in the Board. We then outline in some detail the reasoning of *Lechmere*. Finally, we show that *Lechmere* does not speak to—much less "definitively resolve"—the question posed when organized employees seek to exercise their right to engage in "concerted activity for . . . mutual aid or protection" on the property of someone other than their immediate employer.

A. (1) The Court first confronted the tension between NLRA § 7 and state-law property rights in *Republic Aviation* which involved employees who sought to engage in organizational activity in the workplace. This Court agreed with the Board that it is

> "not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." [324 U.S. at 803 n.10 (quoting *Peyton Packing Co.*, 49 NLRB 828, 843-44 (1943), *enf'd*, 142 F.2d 1009 (5th Cir. 1944)].

Following *Republic Aviation*, the Board applied the same rule to cases involving union organizers who sought access to an employer's property to distribute organizational literature.[2] But in *Babcock & Wilcox*, this Court held that the Board is required "to make a distinction between rules of law applicable to employees and those applicable to nonemployees." 351 U.S. at 113. The Court asserted:

> The distinction is one of substance. No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline . . . But no such obligation is owed nonemployee organizers. [*Id.*]

To the contrary,

> an employer may validly post his property against nonemployee distribution of union literature if rea-

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[2] *See Seamprufe, Inc.*, 109 NLRB 24, 32 (1954), *enf. denied sub nom. Labor Board v. Babcock & Wilcox Co., supra.* ("To differentiate between employees soliciting on behalf of the Union and nonemployee union solicitors would be a differentiation not only without substance but in clear defiance of the rationale given by the Board and the courts for permitting solicitation").

> sonable efforts by the union through other available channels of communication will enable it to reach the employees with its message . . . [*Id.* at 112.]

(2) While the result in *Babcock* was clear enough, the "distinction . . . of substance" that the Court had discerned but had not elaborated proved anything but clear to the Board and the courts of appeals. And, the difficulties raised by the *Republic Aviation—Babcock* dichotomy proved particularly troubling in cases involving the exercise of § 7 rights by organized employees on property owned by someone other than their employer and open to the public generally.

Hudgens v. NLRB, 424 U.S. 507 (1976), was such a case albeit one that did not provide this Court with an occasion for the formulation of definitive rules since the Board decision was based on an erroneous application of the First Amendment and a remand was required to allow the NLRB to render a decision "under the statutory criteria of the National Labor Relations Act alone." *Id.* at 523.[3]

In remanding the case, however, the *Hudgens* Court did offer significant guidance as to the proper method of approach in applying those "statutory criteria." The "task of the Board," *Hudgens* states, "is to 'seek a proper accommodation' " between "§ 7 rights and private property rights." 424 U.S. at 521. And "[w]hat is 'a proper accommodation' in any situation," the *Hudgens* Court added, "may largely depend upon the *content and the context of the § 7 rights being asserted.*" *Id.* (emphasis added).

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[3] *Hudgens* was presaged by *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972), a case involving a nonemployee organizer who sought access to a shopping center parking lot open to the public generally. The Board had granted the nonemployee organizer access to that property on the basis of *Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968), a First Amendment case. The *Central Hardware* Court reversed, holding that the Board "erred in applying *Logan Valley* to this case," and the Court remanded the case for further consideration under the NLRA. 407 U.S. at 539.

The *Hudgens* Court went on to observe that whereas "*Babcock & Wilcox* involved organizational activity carried on by nonemployees on the employers' property," *Hudgens* "was different in several respects": *Hudgens* "involved lawful economic strike activity rather than organizational activity"; the activity "was carried on by [the struck employer's] employees (albeit not employees of its shopping center store)"; and "the property interests impinged upon . . . were not those of the employer against whom the § 7 activity was directed, but of another [business]," which was also a "statutory 'employer' under the Act." *Id.* at 521-22 & n.11. These differences, the *Hudgens* Court stated, "may or may not be relevant in striking the proper balance":

> The *Babcock & Wilcox* opinion established the basic objective under the Act: accommodation of § 7 rights and private property rights "with as little destruction of one as is consistent with the maintenance of the other." The locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance. [424 U.S. at 522].

Hudgens offered for the first time an explanation of why a "wholly different balance," *id.* at 521 n.10, had been struck in *Republic Aviation* and in *Babcock*. In *Republic Aviation*, the *Hudgens* Court explained, "the organizational activity was carried on by employees already rightfully on the employer's property." 424 U.S. at 521-22 n.10.[4] Consequently, *Hudgens* reasoned, in *Republic Aviation* only the employer's "management interests"—and not the employer's "property interests" were implicated. *Id.*; *see also Eastex*, 437 U.S. at 572-73 (employer's "reliance on its property rights is largely misplaced").

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[4] *See also* to the same effect *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), which was decided just two years after *Hudgens*.

In contrast, in *Babcock* the nonemployee organizers "sought to trespass on the employer's property" and the employer's "right to keep strangers from entering on its property" was therefore implicated. *Eastex*, 437 U.S. at 571. This "difference," *Hudgens* and *Eastex* both stated, was the " 'one of substance' " to which *Babcock* had adverted. *Hudgens*, 424 U.S. at 522 n.10, and *Eastex*, 437 U.S. at 571, *quoting Babcock*, 351 U.S. at 113.[5]

(3) It was against this background that the NLRB rendered its decision in *Jean Country*, 291 NLRB 11 (1988), the decision whose holding was at issue in *Lechmere*. The *Jean Country* Board read the line of cases from *Babcock* through *Hudgens* to *Eastex* to teach "that there is a 'spectrum' of Section 7 rights and private property rights and that the place of a particular right in that spectrum might affect the outcome of a case." 291 NLRB at 13. Accordingly, the *Jean Country* Board ruled that "in all access cases our essential concern will

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[5] In dissent in *Eastex*, then-Justice Rehnquist sharply criticized the majority's understanding of the law of property:

> Petitioner's right as a property owner to prescribe the conditions under which strangers may enter its property is fully recognized under Texas law. "A licensee who goes beyond the rights and privileges granted by the license becomes a trespasser." . . . Thus, the employees' effort to distribute their leaflet in defiance of petitioner's wishes would clearly be a trespass infringing upon petitioner's property right. [437 U.S. at 580]

See also, e.g., Note, *Still as Strangers: Nonemployee Union Organers on Private Commercial Property*, 62 Tex. L. Rev. 111, 164-65 (1983) ("It is a purely formal distinction that denies protection to one species of trespassory activity because it is a trespass *ab initio* but privileges the other merely because the trespassory activity occurs a few minutes or hours after the employees are already rightfully on the property"); Note, *Property Rights and Job Security: Workplace Solicitation by Nonemployee Union Organizers*, 94 Yale L.J. 374, 380 (1984) ("The employer is asserting a property right to control not merely access to, but more importantly use of, company property. . . . The artificial invitee-trespasser distinction thus veils the fact that, from the point of view of the employer, all workplace solicitation is trespass").

be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted." *Id.* at 14.

In the three years between *Jean Country* and this Court's decision in *Lechmere*, the Board was repeatedly called upon to apply the *Jean Country* balancing test to efforts by organized employees to communicate (through handbills and pickets) with consumers of a particular retail establishment on property open to the general public but privately owned by the establishment or by a mall, shopping center, or office building in which the establishment was located.[6] Some cases involved striking employees who sought to picket their employer on property belonging to a mall or building owner;[7] other cases involved strikers exercising their right under *Labor Board v. Fruit Packers*, 377 U.S. 58 (1964) (*Tree Fruits*), to urge consumers not to purchase products made by the struck employer and sold by a particular store;[8] and still other cases involved unionized employees exercising their right under *DeBartolo Corp. v. Fla. Gulf Coast Trades Council*, 485 U.S. 568 (1988), to urge consumers not to do busines with stores paying sub-standard wages,[9]

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[6] The pre-*Jean Country* cases likewise largely involved consumer handbilling and picketing rather than organizational activity. *E.g.*, *Browning's Foodland, Inc.*, 284 NLRB 939 (1987); *Smitty's Super Markets, Inc.*, 284 NLRB 1188 (1987); *Skaggs Companies, Inc.*, 285 NLRB 360 (1987); *Sisters International Inc.*, 285 NLRB 796 (1987); *L&L Shop Rite, Inc.*, 285 NLRB 1036 (1987).

[7] *Little & Co.*, 296 NLRB 691 (1989); *Galleria Joint Venture*, 303 NLRB 815 (1991), *on remand*, 317 NLRB 1147 (1995).

[8] *Mountain Country Food Store, Inc.*, 292 NLRB 967 (1989), *enf. denied*, 931 F.2d 21 (8th Cir. 1991); *Sentry Markets, Inc.*, 296 NLRB 40 (1989), *enf'd*, 914 F.2d 113 (7th Cir. 1990); *Sylvan Street Grille*, 303 NLRB 975 (1991).

[9] *D'Alessandro's, Inc.*, 292 NLRB 81 (1988); *Polly Drummond Thriftway, Inc.*, 292 NLRB 331 (1989); *Thriftway Supermarket*, 294 NLRB 173 (1989); *Tecumseh Foodland*, 294 NLRB 486 (1989); *Giant Food Stores, Inc.*, 294 NLRB 330 (1989); *Red Food Stores*,

or hiring sub-standard contractors.[10] Consistent with *Jean Country*, the Board's decision in these cases varied depending upon the nature of the specific § 7 activity and precise property interests involved, as well as the alternative means of communication available to the union.[11]

In *Lechmere, Inc.*, 295 NLRB 92 (1989), *rev'd*, 502 U.S. 527 (1992), in contrast, the Board confronted for the first time an attempt by a union organizer to invoke *Jean Country* to gain access to mall property to place organizational leaflets on the windshields of cars belonging to employees of a mall store. The Board, in a two-page opinion, applied *Jean Country* and found that "[t]he Section 7 right asserted is relatively strong" and would be " 'severely impaired' . . . without entry onto the . . . . . property," while "the impairment" of the employer's property right "would not be substantial . . . in light of the . . . fact that the . . . parking lot is essentially open to the public." 295 NLRB at 93-94.

Thus the law stood prior to this Court's decision in *Lechmere*.

B. In *Lechmere*, the Court provided an entirely new synthesis of its decisions mediating the conflict between NLRA § 7 and state property law—one which eschewed the balancing test of prior opinions and substituted instead a categorical rule for "nonemployee union organizers."

Inc., 296 NLRB 450 (1989); *Wegmans Food Markets, Inc.*, 300 NLRB 868 (1990).

[10] *Target Stores*, 292 NLRB 933 (1989); *Best Co.*, 293 NLRB 845 (1989); *Richway*, 294 NLRB 650 (1989); *Hardee's Food Systems, Inc.*, 294 NLRB 642, *pet. for review denied sub nom. Laborers Local 204 v. NLRB*, 904 F.2d 715 (D.C. Cir. 1990); *Target Stores*, 300 NLRB 964 (1990); *Dillard's, Inc.*, 305 NLRB 1102 (1992).

[11] For cases in which each of the factors noted in text were determinative, *see Richway, supra* n. 10; *Hardee's Food Systems, Inc., supra* n. 10; *Tecumseh Foodland, supra* n. 9; *Red Food Stores, Inc., supra* n. 9; *Sylvan Street Grille, Inc., supra* n. 8.

The *Lechmere* Court began its analysis with the language of § 7, noting that the section "provides in relevant part that '[e]mployees shall have the right of self-organization, to form, join, or assist labor organizations." 502 U.S. at 531. The Court drew the following lesson from this language: "[b]y its plain terms . . . the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers." *Id.* at 532 (emphasis in the original).

Lechmere went on to explain that this—and not any distinction between those "already rightfully on the property" and those who "sought to trespass"—was the "distinction 'of substance' " between *Republic Aviation* and *Babcock*. In cases like *Republic Aviation* involving "the organizing activities of employees (to whom § 7 guarantees the right of self-organization)," *id.* at 533, the Board appropriately " 'balanced the conflicting interests,' " *id.* at 537. But in cases like *Babcock* and like *Lechmere* involving "nonemployees (to whom § 7 applies only derivatively," *id.* at 533, the Board is "not permitted to engage in that same balancing," *id.* at 537. The reason, *Lechmere* explains, is "straightforward":

> *§ 7 simply does not protect nonemployee union organizers except* in the rare case where 'the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.' " 502 U.S. at 37, *quoting Babcock*, 351 U.S. at 112 (emphasis added)].

It was on this basis that the *Lechmere* Court concluded that *Jean Country* "at least as applied to nonemployee organizational trespassing," is not "consistent with our past interpretation of § 7." 502 U.S. at 536. *Lechmere* faulted *Jean Country* for framing a rule "which applies broadly 'to all access cases,' " and thereby "misapprehend[ing] th[e] critical point" as to the limit of § 7. 502 U.S. at 538. "[W]here nonemployee organizing is at issue," § 7 simply is not implicated "[s]o long as nonem-

ployee union organizers have reasonable access to employees outside an employer's property . . ." *Id.* It is "*only* where such access is infeasible" that § 7 is triggered and that "it becomes necessary and proper to . . . balanc[e] the employees' and employers' rights as described in the *Hudgens* dictum." *Id.* (emphasis in the original).

C. Given the reasoning of *Lechmere*, the Board in *Leslie Homes* and the court below could not have been more wrong in concluding that *Lechmere* "resolves . . . definitively," p. 5 *supra*, the cases like this one involving the NLRA § 7 "mutual aid or protection" rights of organized employees and employer property rights.

In the first place, *Lechmere* is, in terms, limited to cases involving "nonemployee union organizers." Indeed, on no less than five separate occasions, the *Lechmere* Court stated the governing "rule" or "holding" in those terms.[12] Even the Board in *Leslie Homes* and the court

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[12] *As a rule* . . . an employer cannot be compelled to allow distribution of union literature by *nonemployee organizers* on his property. [502 U.S. at 533; emphasis added]

There is no hint in *Hudgens* and *Central Hardware* . . . that our invocation of *Babcock*'s language of "accommodation" was intended to repudiate or modify *Babcock's holding* that an employer need not accommodate *nonemployee organizers* unless the employees are otherwise accessible. [*Id.* at 534; emphasis added]

While *Babcock* indicates that an employer may not always bar *nonemployee union organizers* from his property, his right to do so remains the *general rule.* [*Id.* at 535; emphasis added]

Babcock's teaching is straightforward: § 7 simply does not protect *nonemployee union organizers except* in the rare case where "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." [*Id.* at 537; emphasis added]

To say that our cases require accommodation between employees' and employers' rights is a true but incomplete statement, for the cases also go far in establishing the *locus* of that accommodation where *nonemployee union organizing* is at issue. So long as nonemployee union organizers have reason-

of appeals here acknowledged as much. *See* pp. 5, 6 *supra*.

But the Board and the appellate court proceeded as if that limitation were merely a fact distinction on the same order as the hair color of those invoking the NLRA. In truth, however, the entire *rationale* for the *Lechmere* rule —the Court's premises and its analysis—turn on the legal status of nonemployee organizers under the Act. *Lechmere* thus makes sense *only* in that context, and cannot be extend to cases in which organized employees seek to exercise their § 7 right to engage in "concerted activity for . . . mutual aid and protection."

The "critical point" of *Lechmere* is that the Board in *Jean Country* had erred by applying the same rule to NLRA § 7 "self-organizing rights" cases that the Board applied to cases involving other § 7 rights. *Lechmere*, in other words, treats nonemployee union organizers as a separate class because § 7's self-organization clause, as construed in *Lechmere*, makes non-employee union organizers a separate class. That clause, said the *Lechmere* Court, shelters employees who choose to engage in the process of organizing themselves but "does not protect nonemployee union organizers." P. 16 *supra*. Nonemployee organizers thus can invoke § 7 "only derivatively" and only to the extent necessary to protect the rights of employees to self-organize.

Given that logic, it cannot be that the *Lechmere* rule and the *Lechmere* rationale—specifically crafted for § 7 "self-organizing" cases as a class of cases separate from other § 7 cases—governs the latter. Any such conclusion flies in the face of the *Lechmere* opinion and makes a mockery of its reasoning. For cases involving the § 7 right of organized employees to engage in "concerted activity . . . for mutual aid or protection" are 180 de-

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able access to employees outside an employer's property, the requisite accommodation has taken place. [*Id.* at 538; first emphasis in the original]

grees removed from nonemployee organizer cases. In the former as opposed to the latter, the audience—the consumers—have no § 7 rights of their own. And, in the former as opposed to the latter the employee-handbilers do have, and are exercising, a direct § 7 right of their own—a right that the Act grants to them *qua* employees —to engage in concerted acitivty for the employees' mutual aid and protection.

That was what the Ryder employees were doing here—seeking to regain their jobs by persuading consumers not to do business with Sears until Sears resumed its contract with Ryder. And that is and what ocurs in the run of consumer handbilling and picketing cases. These cases thus fall outside the rationale of *Lechmere*.

In a law review article analyzing *Lechmere*, Professor Robert Gorman—on whose work this Court has often relied,[13]—came to the very same conclusion. Gorman, *Union Access to Private Property: A Critical Assessment of Lechmere*, 9 Hofstra Lab. L.J. 1 (1991). Professor Gorman reasoned that "*Lechmere* did not speak at all to the fact situation in the bulk of the cases decided by the Board after 1988 under the *Jean Country* analysis—union appeals to customers of the offending employer, typically a retail establishment in a mall setting." These cases differ from organizing cases, Professor Gorman explained, because in the handbilling context

> the person seeking access to private property to communicate the union's message are—unlike the *Lechmere* nonemployee organizers—"employees" (of the targeted company, a competitor or a company contractually related) within the shelter of Section 7 of the NLRA or are the designated majority representative of those employees (who are properly to be treated as acting in their stead and thus entitled to Section 7 rights as well). [9 Hofstra Lab. L.J. at 23].

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[13] *See, e.g., NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 785 & n.6 (1990); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987).

And Professor Gorman went on to observe that in these cases

> there are Section 7 rights to be taken into account, along with the nature and accessibility of the intended audience, and the property interest of the store and/or mall owner. *In those cases, the tripartite analysis invited by Hudgens and fully formulated in Jean Country should still obtain.* [*Id.* (emphasis added)]

D. The Board majority's reading of *Lechmere*—and the Board rule based on that reading—creates an irrational and incoherent body of law.

If, as the Board and the court below have concluded, *Lechmere* extends to all cases involving "nonemployee access"—that is, to all cases in which "the handbillers are neither employees of any of the employers whose property interests are at issue in this case nor employees with any right to enter the property in the course of their employment," p. 6 *supra*—then *Lechmere* and *Hudgens* are in irreconcilable conflict.[14] For the pickets in *Hudgens* were "nonemployees" in the very same sense as the handbillers here: both were exercising § 7 rights on the property of a mall owner with whom the employees had no proximate employment relationship. The *Hudgens* Court viewed that factor as one which "may or may not be relevant in striking the proper balance," and *not* as one which pretermitted the balancing altogether.

On the other hand, if, as we (and Professor Gorman) read *Lechmere*, the opinion teaches that union organizers have a lesser claim under the NLRA when the employer seeks to close his property (because "§ 7 simply does not

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[14] This reading of *Lechmere* also makes the decision difficult to square with the language of the statute, since NLRA § 2(2) expressly provides that "The term 'employee' shall include any employee, *and shall not be limited to the employees of a particular employer.*"

protect nonemployee union organizers"), then *Lechmere* puts into question the continued vitality of a much-discussed *dictum* in a footnote in *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180 (1978). In that case, in the course of holding that state courts are free to exercise jurisdiction over a state-law trespass suit brought against union picketers protesting the employer's payment of substandard wages, the Court stated that "the argument for protection of trespassory area-standards picketing [is] . . . less compelling than that for trespassory organizational solicitation." *Id.* at 206 n.42. While the Board majority and the court below put great weight in this statement, we submit that the Sear's mode of analysis does not survive *Lechmere.*[16]

Whatever else may be true, then, at least this much is clear: *Lechmere* in no way "resolves . . . definitively" what is the governing law when organized employees seek to exercise their § 7 "mutual aid or protection" rights on property that is privately owned but open to the public, much less explains why that is the law. And, unless this Court intervenes, the Board rules that apply will be rules of law only in a formal—and not a substantive—sense. That unworthy result, we submit, should not come to pass.

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[15] As we have developed, at the time *Sears* was decided, this Court was of the view that the key to resolving conflicts between § 7 and property law was to determine whether those seeking to engage in § 7 activity were "already rightfully on the employer's property," *Hudgens,* 424 U.S. at 521-22 n.10. Indeed, the Court reaffirmed and elaborated on that understanding just one month after *Sears* was decided, in *Eastex, Inc.* That being so, *Sears* viewed the "derivative" nature of the organizer's claim of property access as a factor militating in *favor* of the claim, since the employees on whose rights the organizer relied were themselves already "located on the employer's property." 436 U.S. at 206 n.42. But *Lechmere*'s premise is that in such cases the nonemploye organizer's activities are not within § 7 protections at all.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO, LOCAL NO. 243,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Argued December 11, 1995 Decided January 26, 1996

No. 95-1123

UNITED FOOD AND COMMERCIAL WORKERS, AFL-CIO, LOCAL NO. 880,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

Consolidated with 95-1260

On Petitions for Review of Orders of the National Labor Relations Board

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Before: EDWARDS, *Chief Judge*, BUCKLEY and WILLIAMS, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* EDWARDS.

EDWARDS, *Chief Judge*: In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112-13 (1956), the Supreme Court held "that an employer may validly post his property against nonemployee distribution of union literature," except when "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them."

For more than 35 years, the courts have consistently enforced *Babcock*'s mandate, holding that, as a general rule, section 7 of the National Labor Relations Act ("NLRA" or "Act")[1] does not give *nonemployee* union advocates the right of access to private property. In 1992, the Supreme Court, in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538-39 (1992), reaffirmed the general rule of *Babcock* and emphasized the narrowness of *Babcock*'s "inaccessibility exception."

In the instant cases, representatives and members of petitioner unions sought access to store-owned properties to distribute literature to the stores' would-be customers. In each instance, the unions were denied, or otherwise restricted, in their attempts to gain trespassory access to private property. Complaints were filed with the National Labor Relations Board ("NLRB" or "Board"). Applying the rationale of *Babcock*, the Board ruled that the owners were permitted to restrict access because petitioners failed to show that the customers were not reasonably accessible through nontrespassory means of communication.

The unions claim that the Board erred in applying the *Babcock* doctrine, arguing that *Babcock* and *Lechmere* involved union attempts to organize employees (a "derivative" exercise of the employees' section 7 right to self-organization),[2] whereas here the unions' attempted com-

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[1] Section 7 provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

29 U.S.C. § 157 (1988). Section 8(a)(1) of the NLRA provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]." 29 U.S.C. § 158(a)(1) (1988).

[2] *See* 29 U.S.C. § 157 (1988); *see also Lechmere*, 502 U.S. at 532-33 (The Court observed that the NLRA, by its terms, directly

munications were directed at the stores' customers (an alleged direct exercise of the union members' right to engage in concerted activities for mutual aid or protection). The unions also seek review of the Board's decision requiring a union to show that mass media advertising is not a reasonably effective alternative for communicating the union's message in order to invoke the "inaccessibility exception."

We find no merit in petitioners' attempts to distinguish *Babcock* and *Lechmere*. Under the established case law, it would make no sense to hold that nonemployees have a greater right of access when attempting to communicate with an employer's customers than when attempting to communicate with an employer's employees. Indeed, if anything, under Supreme Court jurisprudence, the hierarchy of rights under section 7 is just the opposite of what the unions assert: *Babcock* and its progeny indicate that, when it comes to balancing an employer's property rights against rights protected under section 7 of the NLRA, the interest of nonemployees in organizing an employer's employees is *stronger* than the interest of nonemployees engaging in protest or boycott activities directed at an employer's customers. The cases cited approvingly by the Court in *Lechmere* manifest this hierarchy. Furthermore, the Board's ruling regarding mass media advertising comports with the discussion in *Lechmere* regarding the narrowness of the inaccessibility exception. Although *Lechmere* itself involved organizational activity, we find no support for the suggestion by petitioners that the exception should be easier to satisfy in the context of nonorganizational activity. Accordingly, the petitions for review are denied.

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confers rights only on employees, but that nonemployee organizers may, in some limited circumstances, "derivatively" exercise the section 7 rights of the employees they seek to organize.).

I. The Supreme Court's Decision in Lechmere

At bottom, the unions assert that, in construing *Lechmere* to apply to nonorganizational activity, the NLRB has impermissibly extended the reach of *Babcock*. According to petitioners, the issues here have yet to be addressed by the Supreme Court, and the Board erred in suggesting otherwise. The Board, on the other hand, found that whatever doubts existed under *Babcock* regarding the rights of nonemployee union advocates to gain access to an employer's private property were resolved by the Court's decision in *Lechmere*. We agree with the Board that, although *Lechmere* does not purport to decide the precise questions at hand in these cases, the Court's rationale in *Lechmere* disposes of the issues raised by petitioners. In fact, for us to rule otherwise would require a dismantling of the *Babcock* doctrine, something certainly not endorsed by the Court in *Lechmere*.

In *Lechmere*, the Court reversed an NLRB ruling that a retail store owner had violated the NLRA by barring nonemployee union organizers from entering its property to distribute union literature. The Board had based its ruling on a multi-factor balancing test set forth in *Jean Country*, 291 N.L.R.B. 11 (1988).[3] The Board deemed its balancing test applicable to "all access cases," 291 N.L.R.B. at 14, without regard for whether those seeking access were employees or nonemployees of the employer seeking to prevent access.

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[3] The Board in *Jean Country* stated:

> [I]n all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process.

291 N.L.R.B. at 14.

The Court found that, "[a]t least as applied to nonemployees, *Jean Country* impermissibly . . . erod[ed] *Babcock*'s general rule that 'an employer may validly post his property against nonemployee distribution of union literature,' " a general rule that the *Lechmere* Court expressly reaffirmed. 502 U.S. at 538 (quoting *Babcock*, 351 U.S. at 112). The Court also took pains to reiterate *Babcock*'s observation "that the [NLRA] drew a distinction 'of substance' between the union activities of employees and nonemployees," *id.* at 537 (citation omitted), and the Court repudiated any notion that subsequent cases had in any way altered *Babcock*'s central holding, *id.* at 534. Thus, although "accommodation between employees' § 7 rights and employers' property rights 'must be obtained with as little destruction of one as is consistent with the maintenance of the other,' " *id.* at 534 (quoting *Babcock*, 351 U.S. at 112), the Court held in accordance with *Babcock* that "[i]t is *only* where [reasonable] access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a . . . level" where employees' and employers' rights are balanced, *id.* at 538.

In *Lechmere*, the Court also noted that section 7, "[b]y its plain terms . . . confers rights only on *employees*, not on unions or their nonemployee organizers." 502 U.S. at 532; *see also* 29 U.S.C. § 157. The Court observed, however, that employees' self-organization rights depend to some degree on the employees' ability to learn from others the advantages of self-organization, and that therefore section 7 "may, in certain limited circumstances, restrict an employer's right to exclude nonemployee union organizers from his property." 502 U.S. at 532.

According to the Court, those "limited circumstances" are defined by the "limited scope" of the inaccessibility exception recognized in *Babcock* that applies "where 'unique obstacles' prevent[] nontrespassory methods of communication." *Id.* at 540, 535 (quoting *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 205-06 n.41 (1978)).

The Court explained that the exception "is a narrow one" and is not to be applied simply because nontrespassory access is "cumbersome or less-than-ideally effective," *id.* at 539; rather, the exception is designed to protect communication-dependent section 7 rights when the target audience is "isolated from the ordinary flow of information that characterizes our society," and the "union's burden of establishing such isolation is . . . 'a heavy one,' "—*id.* at 540 (quoting *Sears*, 436 U.S. at 205). Further, the Court noted that advertising may constitute "reasonably effective" communication that would render the inaccessibility exception unavailable. *Id.*

The core idea of *Lechmere* appears to be that, under section 7 of the NLRA, the private property interest of an employer is sacrosanct as against uninvited *nonemployees*, except in the narrow circumstance where the nonemployees are union organizers who have no other reasonable alternative means of communicating with the employer's employees. There is absolutely nothing in *Lechmere* (nor in the Court's decisions preceding it) suggesting that the rights of nonemployees are enhanced when access to private property is sought by nonemployees to communicate with the employer's *customers*, rather than the employer's employees.

With this background in mind, we turn to the cases here before us.

II. Facts and Procedural Histories of Petitioners' Cases

A. *Oakland Mall II*

In July 1988, Sears, Roebuck & Co. ("Sears") canceled a long-standing home delivery service contract with Ryder DPD ("Ryder"), and contracted instead with Leaseway Trucking. As a result of losing its contract with Sears, Ryder laid off about 100 drivers. In response, the Inter-

national Brotherhood of Teamsters Local 243 ("Teamsters"), who represented Ryder's employees, prepared a handbill for the laid-off drivers to distribute to would-be customers of Sears, urging them not to patronize Sears until Sears once again contracted with Ryder.

On August 2, 1988, six laid-off Ryder drivers, accompanied by one union representative, began to distribute the handbill at two of the eight exterior entrances, and at the one mall entrance, to the Sears store at the Oakland Mall in Troy, Michigan. Each distribution location was on Sears' property. Similarly, on August 9 and 10, 1988, and again on September 7, 1988, the laid-off drivers sought to distribute the same handbill at four entrances to the Sears store in the Macomb Mall in Roseville, Michigan. Three of these entrances were on Sears' property, and one entrance was on mall property. The handbillers' activities were limited to distributing the handbill and asking customers to speak to Sears' management on behalf of the laid-off drivers; no signs were carried or displayed, and there was no picketing at either Sears store.

On each occasion, Sears and/or mall management forced those distributing handbills to leave the premises. While Sears flatly prohibited the handbilling on its property, Macomb Mall Associates ("Macomb Mall") sought to enforce its general, nondiscriminatory policy of requiring nontenant organizations wishing to engage in solicitation or petitioning on mall property to obtain, and to name Macomb Mall as an additional insured under, a liability insurance policy covering bodily injury.

The Teamsters filed unfair labor practice charges aginst Sears and the two malls, alleging that exclusion of the handbillers from property owned by Sears and the malls violated section 8(a)(1) of the NLRA, 29 U.S.C. § 158 (a)(1). The NLRB initially affirmed the determination of an Administrative Law Judge ("ALJ") that Sears and the malls had violated the Act. *See Oakland Mall, Ltd.*, 304 N.L.R.B. 832 (1991) (*"Oakland Mall I"*). Sears

and Macomb Mall petitioned for review in this court, and the Board filed a cross-application for enforcement of its order. While the case was pending, the Supreme Court decided *Lechmere*, in light of which this court remanded the case for the Board's reconsideration.

On remand, the NLRB held that the *Babcock* analysis affirmed in *Lechmere* is applicable to nonemployee consumer boycott activities, such as the handbilling at issue in *Oakland Mall I. Oakland Mall, Ltd.*, 316 N.L.R.B. 1160 (1995) (*"Oakland Mall II"*). The Board "assume[d], without deciding, that the *Lechmere* analysis affords the possibility of an exception permitting access to private property for nonemployee consumer boycott activity if a union can prove that an employer's customers are not reasonably accessible by nontrespassory methods." *Id.* at 1163 n.13. Thus, the NLRB turned to the question of whether the union had proven that it had no reasonable alternative means of communicating with Sears' customers. A majority of the Board ruled that, in light of *Lechmere*, which "emphasized the narrowness of the inaccessibility exception," it was "necessary to reconsider" and overrule Board precedent, such as *Jean Country*, that had held "that 'generally it will be the exceptional case where the use of newspapers, radio, and television will be feasible alternatives to direct contact.' " *Id.* at 1163 (quoting *Jean Country*, 291 N.L.R.B. at 13). Rather, the Board adopted a rule whereby a union "must show that the use of the mass media . . . would not be a reasonable alternative means for the Union to communicate its message." *Id.*

The Board decided that the union in the present case had made no such showing; indeed, the Board found that the union did not consider the option of mass-media communication of its message to Sears' potential customers. *Id.* Thus, the Board majority ruled that the union had failed to carry its heavy burden of proving "unique obstacles" to the communication of its consumer boycott

message to Sears' customers, and concluded that Sears and Macomb Mall did not act unlawfully in respectively prohibiting and imposing an insurance requirement on the union's handbilling on their properties.[4] *Id.* at 1164.

B. *Loehmann's Plaza II*

In the second case under review, representatives of United Food and Commercial Workers Union Local No. 880, AFL-CIO ("UFCW") directed both picketing and handbilling at the customers of Makro, Inc. ("Makro"), which operates a retail store in a strip mall owned by Loehmann's Plaza in Willoughby Hills, Ohio. The picket signs and leaflets implored customers not to shop at the Makro store because Makro's treatment of its non-union employees might jeopardize union-negotiated wage and benefit standards for retail employees in the area. This "area standards" activity was conducted by representatives of UFWC, union members who worked at stores other than Makro, and paid pickets including family and friends of union members and representatives.

Makro and the mall owner directed the picketers and handbillers to leave their positions at the entrances and exits of the Makro store. When they refused, Makro and the mall owner obtained a state-court injunction preventing more than certain numbers of picketers from taking up positions in front of Makro's store and the entrance to the parking lot, and restraining the parking-lot picketers from coming within 25 feet from the front of the building. The union, in turn, filed an unfair labor practice charge, alleging a violation of section 8(a)(1).

The Board initially ruled that Makro and the mall owner had acted unlawfully. *Makro, Inc.*, 305 N.L.R.B. 663

[4] On remand, the Board did not address the issue of whether Oakland Mall, Ltd. ("Oakland Mall") had violated the NLRA, because Oakland Mall did not file exceptions to the ALJ's finding that it violated the Act. *Oakland Mall II*, 316 N.L.R.B. at 1160 n.7.

(1991) ("*Loehmann's Plaza I*"). However, petitions for review and for enforcement were filed before the Sixth Circuit, which remanded the case to the Board for reconsideration in light of *Lechmere*.

The NLRB reversed its initial decision, and instead decided to dismiss the union's complaint. *Makro, Inc.*, 316 N.L.R.B. 109 (1995) ("*Loehmann's Plaza II*"). As in *Oakland Mall II*, the Board majority applied the *Babcock* analysis affirmed in *Lechmere*, concluding that "the Union had a reasonable alternative for conveying its message" through picketing at the entrances to the shopping center. *Id.* at 113. And as in *Oakland Mall II*, the union seeks review of the Board's interpretation of *Lechmere* as requiring *Babcock* analysis in this case. However, "[n]o review is sought . . . of the Board's determination that, if *Babcock* applies, reasonable alternative means existed to communicate with Makro's potential customers." Brief for the Petitioners at 12 n.2.

III. Application of the Babcock Rule Outside the Organizational Context

At heart, this case is a simple one. *Babcock* establishes (and *Lechmere* reaffirms) a general rule under which an employer may deny access to nonemployees seeking to trespass on the employer's property. In the cases at hand, petitioners' activities involved the trespass of nonemployees onto employers' properties, in response to which the employers barred them access. No recognized right under section 7 has been shown to apply; therefore, the employers' actions were not unlawful under the NLRA. There should be no more to the matter than that. However, petitioners attempt to obfuscate this straightforward analysis by proffering artificial distinctions between the section 7 rights asserted in *Babcock* and *Lechmere*, and those being asserted here.

In particular, petitioners make much of the fact that *Lechmere* involved organizational section 7 activity, and

argue that the Court's reasoning in that case does not apply to consumer boycott and "area standards" activities directed at an employer's customers. We decline to read *Lechmere* so narrowly. As the Board has observed, there is "no suggestion in the Court's opinion . . . that it focused on organizing activities for any reason other than that *Lechmere* was an organizing case, and that the Court was simply (and prudently) deciding the case before it." *Leslie Homes, Inc.*, 316 N.L.R.B. 123, 128, *pet. for review denied sub nom. Metropolitan Dist. Council of Phila. and Vicinity United Bhd. of Carpenters and Joiners of Am. v. NLRB*, 68 F.3d 71 (3d Cir. 1995).

Moreover, *Lechmere* clearly does not purport to overrule, or even modify, prior Court precedent dealing with the tension between property rights and alleged section 7 rights. The precedent cited approvingly in *Lechmere* establishes that, if there are any rights at all to be asserted outside the organizational context, *Babcock* applies. *Compare Sears*, 436 U.S. at 204 (The Court observed "that *Babcock* extends to § 7 rights other than organizational activity, though the 'locus' of the 'accommodation of § 7 rights and private property rights . . . may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context.'" (quoting *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976))) *with Central Hardware Co. v. NLRB*, 407 U.S. 539, 544-45 (1972) (The Court stated that "[t]he principle of *Babcock* is limited to [an] accommodation between organization rights and property rights. This principle requires a 'yielding' of property rights only in the context of an organization campaign. . . . In short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal.").

Further, assuming, arguendo, that nonemployees have rights to assert in the nonorganizational context, it makes

sense that the *Babcock* rule reaffirmed in *Lechmere* would apply with no less force in the context of area standards or consumer boycott activities. Supreme Court precedent clearly establishes that, as against the private property interest of an employer, union activities directed at consumers represent weaker interests under the NLRA than activities directed at organizing employees. A long history of cases manifests a hierarchy among section 7 rights, with organizational rights asserted by a particular employer's own employees being the strongest, the interest of non-employees in organizing an employer's employees being somewhat weaker, and the interest of uninvited visitors in undertaking area standards activity, or otherwise attempting to communicate with an employer's customers, being weaker still.[5] Thus, "[u]nder the § 7 hierarchy of pro-

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[5] *Compare Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (The Court approved the Board's determination that an employer barring its employees from distributing union literature on its property generally places an unreasonable impediment on the freedom of communication essential to the exercise of its employees' right to self-organization.) *and Babcock*, 351 U.S. at 113 (Where the Board had concluded that it was necessary to allow nonemployee union organizers to distribute union literature on an employer's property, the Court affirmed the vitality of *Republic Aviation*'s holding as to restrictions imposed by an employer on its *employees*, but chided the Board for "fail[ing] to make a distinction between rules of law applicable to employees and those applicable to nonemployees.") *with Sears*, 436 U.S. at 206 n.42 ("[S]everal factors make the argument for protection of trespassory area-standards picketing as a category of conduct less compelling than that for trespassory organizational solicitation . . . . [T]he right to organize is at the very core of the purpose for which the NLRA was enacted . . . . [whereas] [a]rea-standards picketing . . . has only recently been recognized as a § 7 right.") *and Central Hardware*, 407 U.S. at 545 ("[T]he principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal."). *See also NLRB v. Great Scot, Inc.*, 39 F.3d 678, 682 (6th Cir. 1994) (Upon reviewing Supreme Court law, the Sixth Circuit observed that *employee* organizational rights are at the "core" of section 7's ambit of protection, that, even within the context of organizational activi-

tected activity imposed by the Supreme Court," nonemployee activity in which "the targeted audience was not [an employer's] employees but its customers" "warrants even *less* protection than non-employee organizational activity." *NLRB v. Great Scot, Inc.*, 39 F.3d 678, 682 (6th Cir. 1994).

Therefore, given that "nonemployee organizational trespassing ha[s] generally been prohibited except where 'unique obstacles' prevented nontrespassory methods of communication," *Lechmere*, 502 U.S. at 535 (quoting *Sears*, 436 U.S. at 205-06 n.41), it follows *a fortiori* that nonemployee trespassing for purposes of asserting *weaker* section 7 interests will be prohibited in the absence of "unique obstacles" triggering the inaccessibility exception. Moreover, "the balance struck . . . under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity," so "[e]ven on the assumption that picketing to enforce area standards is entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation, it would be unprotected in most instances." *Sears*, 436 U.S. at 205-06 (footnote omitted).

Finally, the distinction urged by petitioners between derivative and nonderivative section 7 rights is unsupported by the case law. The alleged distinction can be traced back to *Babcock*, where the Court observed that the strength of nonemployee organizers' interest in access to an employer's property flows from, and is limited by, the degree to which the target employees' right of self-organization depends on their "ability . . . to learn the advantages of self-organization from others." 351 U.S. at 113. However, *Babcock*'s discussion of the derivative nature of the section 7 rights exercised by nonemployee organizers does not focus on derivativeness for its own

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ties, there is a distinction between the rights afforded employees and nonemployees, and that "[n]on-empolyee area-standards picketing is even farther removed from the core concerns of § 7.").

sake, but rather as a means of addressing the broader, essential issue: the degree to which trespass is necessary to exercise section 7 rights.[6] There is no assertion in *Babcock* that derivatively exercised section 7 rights are inherently weaker than rights based on activities by non-employees who have no organizational purpose, and *Lechmere*'s parenthetical reference to "derivatively" exercised section 7 rights in recounting *Babcock*'s analysis does not purport to expand on *Babcock*'s reasoning. *See Lechmere*, 502 U.S. at 532. Indeed, the so-called "derivative" rights obviously are stronger than those lacking a connection to the employees, for, as noted in *Sears*, "the right to organize is at the very core of the purpose for which the NLRA was enacted . . . [whereas] [a]rea standards picketing . . . has only recently been recognized as a § 7 right." 436 U.S. at 206 n.42. We find, as have the other circuits that have considered the issue, that *Lechmere* does not create a distinction between the strengths of derivative and nonderivative section 7 rights.[7]

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[6] The *Babcock* Court observed that, because employees' exercise of their section 7 right of self-organization depends on communication with organizers, the organizers' interest in trespassory access to an employer's property becomes paramount when such access is the only reasonably available means of communicating with the employees about organizing; and in that situation, "the employer must allow the union to approach his employees on his property." *See* 351 U.S. at 113.

[7] For example, in *Metropolitan Dist. Council of Phila. and Vicinity United Bhd. of Carpenters and Joiners of Am. v. NLRB*, 68 F.3d 71 (3d Cir. 1995), the court denied review in a case in which the petitioner union asserted essentially the same derivative/nonderivative rights argument presented by petitioners here. The Third Circuit rejected the derivative/nonderivative rights distinction, finding no reason why the property-right-favoring accommodation reached in *Lechmere* "would be any less compelling in a case in which a union was engaged in area standards handbilling than in a case where the union was engaged in direct organizational activity." 68 F.3d at 74-75. See also *NLRB v. Great Scot, Inc.*, where the Sixth Circuit cited *Lechmere* for the proposition that "non-employees do have a 'derivative right' to engage in organizational

In effect, the Court in *Babcock* made a once-and-for-all determination that, in the absence of an inaccessibility showing, the locus of accommodation for cases involving trespass by nonemployee union adherents will always fall in the range favoring denial of access, and *Lechmere* reaffirmed that determination.[8] And although *Babcock* and *Lechmere* were organizational cases, the reasoning therein is equally applicable in any situation where the exercise of a section 7 right requires communication of a message to a target group. *Cf. Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 997-98 (9th Cir. 1992) (The Ninth Circuit interpreted *Lechmere* as requiring application of the basic rule allowing an employer to prevent nonemployee trespass, not only in cases of organizational communication directed at an employer's employees, but also in cases where "the pickets and handbills [a]re aimed at the general public."). In all such target-audience situations, *Babcock* and *Lechmere* indicate that the degree to which the exercise of the asserted section 7 right *depends on* trespassory access to an employer's property—*i.e.*, the degree to which the target audience is otherwise inaccessible—should be the critical consideration in the accommodation analysis; and the locus of accommodation should always fall in the denial-of-access range if there has been no showing that the target audience is not reasonably reachable through nontrespassory means of com-

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activities," but clearly identified consumer-targeted activity in direct exercise of section 7 rights as being *lower* on the section 7 totem pole than nonemployee organizational activity, despite the latter's derivative nature. 39 F.3d at 682.

[8] *See Lechmere*, 502 U.S. at 538 ("To say that our cases require accommodation between employees' and employers' rights is a true but incomplete statement, for the cases also go far in establishing the *locus* of that accommodation where nonemployee organizing is at issue . . . . It is *only* where . . . access [to employees] is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights . . . .").

munication. The Board did not err in applying this analysis in the present cases.

IV. The Inaccessibility Exception

In light of our conclusion that *Babcock*, as reaffirmed in *Lechmere*, applies to the present cases, there is no reason to think that *Lechmere*'s emphasis on the narrowness of the inaccessibility exception to the general rule should not be fully applicable as well. Indeed, given that the organizational activity at issue in *Lechmere* itself appears to represent a stronger section 7 interest than the area standards and consumer boycott activities at issue here, it would be perverse to find that the threshold for the inaccessibility exception should be lower in this case than in *Lechmere*.[9]

In addition, the Board's statement in *Jean Country* that "generally it will be the exceptional case where the use of [forms of the mass media] will be feasible alternatives to direct contact," 291 N.L.R.B. at 13, is clearly at odds with *Lechmere*'s discussion of the inaccessibility exception. Although the Court in *Lechmere* declined to address the Board's specific finding that the union's local newspaper advertising was not reasonably effective in that case,[10] the Court did note that advertising may constitute "reasonably effective" communication for purposes of the inac-

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[9] In *Sparks Nugget*, the Ninth Circuit went further by finding that the inaccessibility exception does not apply *at all* in situations where customers, and not employees, are the target audience; alternatively, the court stated that, even if the exception were applicable, *Lechmere* would require a finding that the intended audience is presumptively not inaccessible "because the targets of the union protest do not reside on the employer's property." 968 F.2d at 997-98 (internal quotation and alteration omitted).

[10] The Court found no occasion to address the merits of the Board's conclusion that the local newspaper advertising used by the union organizers was not reasonably effective, because the Court found that "other alternative means of communication were readily available" to the union. 502 U.S. at 540.

cessibility exception, and stressed that the heavy burden of establishing inaccessibility rests solely on the union. *Lechmere*, 502 U.S. at 540. Further, the Court declared that the union's burden is "not satisfied by mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication;" rather, the union must show that the target audience is "isolated from the ordinary flow of information that characterizes our society." *Id.*

The Court's discussion clearly does not countenance a rule that assumes the ineffectiveness of paid mass media advertising and obviates the need for the union to meet its burden of establishing that "unique obstacles" render the target audience isolated from nontrespassory methods of communication. Thus, in *Oakland Mall II*, the Board properly reconsidered its discussion of mass media communication in *Jean Country*, and violated no right of petitioner's when it adopted a rule that comports with *Lechmere* by requiring a "show[ing] that the use of the mass media . . . would not be a reasonable alternative means for the Union to communicate its message." *See Oakland Mall II*, 316 N.L.R.B. at 1163.

V. Conclusion

For the reasons set forth above, the petitions for review are denied.

So ordered.

APPENDIX B

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 7-CA-28367 and 7-CA-28446

OAKLAND MALL, LTD. and SEARS, ROEBUCK AND CO. and LOCAL 243, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO [1]

MACOMB MALL ASSOCIATES, a Limited Partnership and SEARS, ROEBUCK AND CO. and LOCAL 243, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

April 12, 1995

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

This is the first occasion for us to consider how the Supreme Court's opinion in *Lechmere, Inc. v. NLRB* [2] affects a secondary employer's right to bar nonemployee union representatives from engaging in secondary consumer boycott handbilling on the employer's private property. The narrow issues before us are (1) whether Respondent Sears, Roebuck and Co. (Sears) violated Section 8(a)(1) of the Act by prohibiting such handbilling at the public entrances to its stores at both the Oakland and Macomb Malls, and (2) whether Respondent Macomb Mall violated Section 8(a)(1) of the Act by prohibiting such handbilling at the interior (mall) entrance to the Sears' store in Macomb Mall unless the

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[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] 502 U.S. 527 (1992).

Union first obtained a $500,000 liability insurance policy naming Macomb Mall as an additional insured party.

I. PROCEDURAL BACKGROUND

On June 2, 1989, Administrative Law Judge Michael O. Miller issued the attached decision in this case, in which he applied the framework for analysis set forth in *Jean Country*, 291 NLRB 11 (1988), for issues involving denial of nonemployee access to employer property, and found that the Respondents had violated the Act.[3]

On August 27, 1991, the Board issued a Decision and Order in this case, *Oakland Mall I*,[4] affirming the judge's findings and conclusions. Thereafter, Respondents Sears and Macomb Mall filed petitions for review of the Board's Decision and Order in the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-application for enforcement of its Order.

On January 27, 1992, the Supreme Court issued its opinion in *Lechmere*, holding that the Board's balancing test in *Jean Country*, as applied to the nonemployee union organizers in that case, was inconsistent with controlling Supreme Court precedent. Thereafter, the Board and Respondent Sears filed a joint motion with the court of appeals to dismiss without prejudice the Respondents' petitions for review and the Board's cross-application for enforcement, and to remand the case to the Board for reconsideration in light of *Lechmere*. The joint motion was granted, and the Board notified the parties that they could submit statements of position to the Board on the issues raised by the Board's reconsideration of the case.[5]

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[3] Respondents Sears and Macomb Mall filed exceptions (with supporting briefs) to the judge's decision, and the General Counsel filed an answering brief. Respondent Oakland Mall did not file exceptions or a brief.

[4] 304 NLRB 832.

[5] Statements of position were submitted by the General Counsel, the Charging Party Union, and Respondents Sears and Macomb

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On reconsideration of *Oakland Mall I* in light of *Lechmere*, the statements of position of the parties, the briefs of the amici curiae, and our recent decision in *Leslie Homes, Inc.*,[6] we have decided to overrule certain of our unfair labor practice findings in *Oakland Mall I* and to dismiss those allegations against Respondents Sears and Macomb Mall.[7]

II. FACTS

The facts are fully set out by the judge in the attached decision. They are essentially as follows.

The Union's primary dispute was with Ryder DPD, which laid off trucking employees represented by the Union after Sears canceled its contract with Ryder for home delivery services in July 1988. Sears replaced Ryder with Leaseway Trucking, which had no contract with the Union, and which hired only a few of the laid-off Ryder employees. The Union responded with a handbilling campaign directed solely at Sears' customers at the Sears' stores in the Oakland and Macomb Malls, in Troy and Roseville, Michigan, respectively. The handbillers were mostly former Ryder employees; none were employees of any of the Respondents. There were no signs carried or displayed and there was no picketing.

Mall. Additionally, amicus curiae briefs were submitted to the Board by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the Chamber of Commerce of the United States of America (Chamber of Commerce), the National Retail Federation (NRF), and the Council on Labor Law Equality (COLLE).

[6] 316 NLRB No. 29 (Jan. 25, 1995).

[7] As noted above, Respondent Oakland Mall did not file exceptions to the judge's finding that it violated the Act. Consequently, the allegations against Respondent Oakland Mall, and the violations found on the basis of them, are not before the Board.

There is no evidence that the handbillers attempted to prevent any customers from entering the stores. The handbills, which urged Sears to once again contract with Ryder so that the Union's members could regain jobs as Ryder drivers delivering for Sears, contained the following message:

ATTENTION SHOPPERS

PLEASE do not shop at this . . . .
Sears & Roebuck Store!

Sears no longer uses a Company that employs Local 243 Members to deliver merchandise.

As a result, (100) One Hundred Members of Local 243 have lost their jobs. Our Members need your help to get their jobs back.

Thank You . . . .
Teamsters Local No. 243

In addition to distributing the handbills, the former Ryder employees asked customers to speak on their behalf to Sears' management.

A. *Oakland Mall*

Sears occupies Oakland Mall along with 3 other major department stores and 140 specialty shops. There is a single, wide interior entrance into Sears from inside the mall, and eight exterior entrances with double or quadruple doors from the sidewalk surrounding Sears. Sears owns its store building and surrounding sidewalks, the mall area adjacent to the mall entrance (extending 12 feet into the mall area), and a 3000-car parking lot adjacent to the store. The parking lot extends several hundred feet to paved or grass-covered public easements, about 12 to 20 feet wide, surrounding the lot, which themselves adjoin the six- and four-lane thoroughfares bordering the mall. Sixty-five percent of Sears' customers enter the Sears' parking lot through two of the five automobile entrances, and the rest of the customers use the

other three entrances about equally. About 80 percent of Sears' customers enter the store through the eight exterior entances. The rest use the interior entrance from the mall.

No-solicitation/no-distribution signs are posted at the exterior entrances, and these rules have been strictly and uniformly enforced, with the only exception being for a limited number of Salvation Army bell ringers at Christmas time.

On August 2, 1988, Union Organizer Thomas Ziembovic and about six laid-off Ryder employees began to handbill the Sears' store at the interior mall entrance and at two exterior entrances, all of which were on Sears' property. Sears' store manager, Marshall Dyke, told the two handbillers at the mall entrance that they were not allowed to handbill and that they were on Sears' property. The handbillers left the mall entrance. The handbillers at the other entrances refused Dyke's demand that they stop handbilling. Dyke called the police. At Dyke's request, the police ordered the handbillers off Sears' property. The police told them that they could handbill on the public easement around the property, but that if they obstructed traffic or refused to follow police orders, they would be arrested.[8] The handbillers did not attempt to handbill cars at the public easement, and made no further attempts to handbill Sears' customers at Oakland Mall.

B. *Macomb Mall*

Sears occupies Macomb Mall along with 1 or 2 smaller department stores and about 90 specialty shops. There is a single, relatively wide interior entrance into Sears

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[8] Oakland Mall itself also denied the handbillers' permission to handbill anywhere on mall property, including at the mall entrance to the Sears' store. The judge found that Oakland Mall violated the Act by doing so, and, as noted above, there were no exceptions to that finding.

from the mall, and about seven other exterior entrances with single, double, or quadruple doors from the sidewalk surrounding Sears. Sears owns its store building and surrounding sidewalks and a 1500-car parking lot adjacent to the store. The parking lot extends to hard-surfaced public easements, about 15 to 20 feet wide, surrounding the lot, which themselves adjoin the multilane thoroughfares bordering the mall. About 40 percent of Sears' customers enter the lot through one particular automobile entrance, and the rest of the customers use the other seven entrances about equally. About 80 percent of Sears' customers enter the store through the several exterior entrances. The rest use the interior entrance from the mall.

No-solicitation/no-distribution signs are posted at every entrance, and these rules have been strictly enforced, without exception. In addition to Sears' no-solicitation/no-distribution policy, Macomb Mall itself also had a strictly enforced policy covering solicitation, petitioning, and vending on mall property by nontenants. Under that policy, nontenant organizations wishing to engage in such activities on mall property are required to complete an application describing the proposed activity, sign both a "Hold Harmless and Indemnification Agreement" and an agreement to abide by the rules established for such activities, and provide the mall with a certificate of insurance (similar to that required of its commercial tenants) establishing that Macomb Mall has been named as an additional insured under a liability policy carrying a minimum coverage of $500,000 for each occurrence of bodily injury. After meeting these requirements, numerous organizations have held shows, exhibits, and fundraisers in the mall.

On August 9, 1988, the Union began to handbill at several of Sears' exterior entrances and at its interior mall entrance (which was Macomb Mall property, unlike the interior mall entrance at Oakland Mall, which was Sears' property for 12 feet into the mall area). Mall manage-

ment told the handbillers at the mall entrance to stop. The handbillers refused, and continued until they ran out of handbills. The mall told the Union it would have to comply with the above-described application and insurance requirements in order to be permitted to handbill on mall property. Ultimately, however, the Union was unable to obtain such insurance, and thus was never permitted to handbill on mall property.

The next day, August 10, the Union again handbilled at the mall entrance and at several exterior entrances. Sears' management told the handbillers that they were on private property and would have to leave, or Sears would call the police. The handbillers refused to leave and Sears called the police. The police ordered the handbillers to leave Sears' property, under threat of arrest. The police told the handbillers that they could handbill from the easements around the parking lot, but that if they stepped off the easements and handbilled in the street, they would be arrested for obstructing traffic. The handbillers left without attempting to handbill anywhere else. This sequence of August 10 events was essentially repeated about a month later, on September 7.

III. THE SUPREME COURT'S OPINION IN LECHMERE

In *Lechmere, Inc. v. NLRB*,[9] the Supreme Court held that *Jean Country* impermissibly recast as a "multifactor balancing test" the general rule of *NLRB v. Babcock & Wilcox Co.*[10] permitting an employer to prohibit nonemployee distribution of union organizational literature on its property. 502 U.S. at 538. *Babcock*'s holding, as reaffirmed in *Lechmere*, is that Section 7 does not allow nonemployee union organizers to come onto private property *except* in the rare case where "the inaccessibility of em-

[9] 502 U.S. 527 (1992).

[10] 351 U.S. 105 (1956).

ployees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." Id. at 537. Thus, "[i]t is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights . . . ." Id. at 538 (emphasis in original).

IV. CONTENTIONS OF THE PARTIES

The General Counsel, Respondents Sears and Macomb Mall, the Chamber of Commerce, NRF, and COLLE contend that the Court's interpretation of *Babcock* in *Lechmere* applies to the nonemployees in this case who were seeking access to the Respondents' properties to engage in consumer boycott handbilling. The General Counsel argues, however, that the Respondents' denial of access to their properties was unlawful even under the *Babcock/Lechmere* analysis because no reasonably effective alternatives existed for the Union to communicate its message to the public. The Respondents, the Chamber of Commerce, NRF, and COLLE contend, on the other hand, that the General Counsel has failed to prove a lack of reasonable alternative means.

The Union and amicus AFL-CIO argue that the *Babcock/Lechmere* analysis involved organizational activity and should not apply to protected consumer boycott activity. More specifically, the Union argues that the handbillers in this case, rather than being "nonemployees," were in fact laid-off employees of Ryder, and that they were thus not within the scope of the permissible employer restrictions on nonemployee trespass addressed in *Babcock* and *Lechmere*. The Union argues further that the handbillers in this case, as "employees" within the meaning of the Act, were entitled to its full protection, that state law property rights of employers must yield to the extent necessary for "full and complete operation of the rights of employees under the Act," that such employees are not

obligated to search for other reasonable, effective ways to exercise their rights when the conduct they engaged in was completely lawful and effective, and that therefore the Board should not balance an employer's nonstatutory property interests with the statutory rights of employees.

The AFL-CIO argues that where, as here, employees covered by the Act seek to engage in protected concerted activity on the property of a person other than their own employer, the Board should either continue to apply the *Jean Country* accommodation analysis or, preferably, apply a rule of law assertedly based on the rationale of the Supreme Court's opinions in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), and *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978): i.e., that employer actions prohibiting the exercise of direct Section 7 rights on the employer's property constitute an illegal interference with those rights unless the employer has an adequate business justification for the prohibition, involving more than just the bare invocation of property rights.

V. DISCUSSION

In *Leslie*, supra, the Board considered the impact of *Lechmere* on nonemployee, area standards activity. After reviewing *Lechmere* and related Court precedent,[11] the Board concluded that the Court intended the *Babcock* accommodation analysis to apply in nonorganizational settings. Accordingly, the general rule is that an employer may prohibit nonemployees from gaining access to its private property to engage in area standards activities. No balancing of employee and employer rights is appropriate unless the union can first demonstrate that it lacks reasonable access to the employer's customers outside the employer's property. For the reasons fully set forth in *Leslie*,

[11] *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206 (1978).

we find that the *Babcock* accommodation analysis, and the general rule articulated above, also apply to the nonemployee consumer boycott activities in the instant case.[12]

We turn then to the question of whether the General Counsel has proven that the Union had no reasonable alternative means of communicating with Sears' customers.[13] In *Lechmere*, the Court stated that the *Babcock*

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[12] We therefore do not rely on the judge's assessment of the relative strengths of the property and Sec. 7 rights asserted by the parties.

We find that the handbillers are "nonemployees" in this context because they were neither employees of any of the employers whose property interests are at issue in this case nor employees with any rights to enter the property in the course of their employment under a subcontract. Cf. *Southern Services*, 300 NLRB 1154 (1990), enfd. 954 F.2d 700 (11th Cir. 1992) (*Republic Aviation* governs the organizing activities of cleaning subcontractor's employees which took place on private premises that were the employees' regular and exclusive worksite).

[13] As in *Leslie*, we assume, without deciding, that the *Lechmere* analysis affords the possibility of an exception permitting access to private property for nonemployee consumer boycott activity if a union can prove that an employer's customers are not reasonably accessible by nontrespassory methods.

We recognize that here, unlike in *Lechmere* and *Babcock*, the Union is not seeking to represent employees, but in fact already represents the former Ryder employees and is seeking to exert pressure to restore their jobs by persuading Sears to recontract with Ryder. We do not see that as a reason for not applying the general rule of *Lechmere/Babcock*. The fact remains that the Union represents no employees who have a present connection to any employer with an interest in the property or employees who have any claim to having been unlawfully terminated by such an employer. The *Lechmere/Babcock* general rule, as well as its inaccessability exception, would indisputably apply were the Union to seek to organize the employees of Leaseway, who are now performing the work formerly contracted to Ryder. But the Union has expressed no such intent. Because Sears is a neutral with respect to the labor relations of independent contractors such as Leaseway and Ryder, pressure on Sears to cease doing business

exception requiring access to private property by nonemployee organizers applied only in rare situations where a union confronts "unique obstacles" to nontrespassory communications, as when the location of a plant and the living quarters of employees "isolated [them] from the ordinary flow of information that characterizes our society." 502 U.S. at 540. The Court emphasized that the union's burden of proving the exception is a heavy one, which cannot be satisfied "by mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication." Id.

In accordance with that approach dictated by the Court, we need not exhaustively analyze the feasibility of every conceivable means by which a union might communicate its message to an audience, so long as there is at least one possible means, and the General Counsel has put on no evidence at all that that means is not feasible. We therefore do not undertake here the task of analyzing the feasibility of handbilling while standing on easements around the parking lots or on public property at the mall perimeter, because we find that the General Counsel has failed to show that various means of mass communication were not an available means of presenting the Union's message to potential customers of Sears.

In this regard, we acknowledge that in *Jean Country*, the Board noted that "generally it will be the exceptional case where the use of newspapers, radio, and television will be feasible alternatives to direct contact." 291 NLRB at 13. However, in *Lechmere*, the Supreme Court reaffimed *Babcock's* general rule that an employer may validly post his property against nonemployee distribution of union literature and emphasized the narrowness of the inacces-

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with Leaseway and recontract with Ryder is secondary pressure. It would be anomalous to permit greater leeway respecting trespass for this kind of activity than for the primary activity of organizing a property owner's own employees.

sibility exception to that rule. As noted above, the Court stated that for the exception to apply the union must confront "unique obstacles" to nontrespassory communications, such as employees "isolated from the ordinary flow of information that characterizes our society." 502 U.S. at 540.

In light of *Lechmere*, we find it necessary to reconsider the comment in *Jean Country* quoted above. Newspapers, radio, and television are certainly part of "the ordinary flow of information that characterizes our society." At least where the Section 7 right is as attenuated as the one in question here,[14] we find that the General Counsel must show that the use of the mass media (such as newspapers, radio, and television) would not be a reasonable alternative means for the Union to communicate its message.

No such showing has been made in the instant case. Indeed, the scant evidence on this question establishes only that the Union did not consider mass media communication of its message. Thus, Union Organizer Thomas Ziembovic testified that the Union never attempted to use newspapers, television, radio, mass mailings, or other "public medias" to advertise its dispute with *Sears*. In the absence of supporting evidence, we cannot rely on "mere conjecture" or "expressions of doubt" to dismiss use of the mass media as a reasonable alternative means. Id. at 540.

Our dissenting colleague cites expense and remoteness as "shortcomings" in the use of mass media. As to the former, the General Counsel adduced no evidence as to the costs of using mass media. As to the latter, we assume

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[14] Like area standards handbilling, secondary consumer boycott handbilling is a less favored Sec. 7 right under the *Babcock* analysis. See, e.g., *Sears, Roebuck & Co. v. San Diego County Council of Carpenters*, 436 U.S. 180 (1978); *Federated Department Stores*, 294 NLRB 650, 651-652 (1989); *Hardee's Food Systems*, 294 NLRB 642, 643 (1989), affd. sub nom. *Laborers Local 204 v. NLRB*, 904 F.2d 715 (D.C. Cir. 1990); *Best Co.*, 293 NLRB 845, 847 (1989).

arguendo that confrontations at a store are more effective than, for example, an advertisement in a newspaper. However, it is clear that the broad proscription on nonemployee trespass will apply even if nontrespassory communication is "less-than-ideally effective." Id. at 539.

Based on the foregoing, we find that the General Counsel has failed to carry his heavy burden of proving "unique obstacles" to the Union's attempt to communicate its consumer boycott message to Sears' customers. Therefore, we conclude that Respondents Sears and Macomb Mall did not act unlawfully by prohibiting, or imposing an insurance requirement on, the Union's handbilling on the Respondents' properties. Accordingly, we shall dismiss the complaint against Respondents Sears and Macomb Mall.

CONCLUSIONS OF LAW

1. Respondent Sears has not violated Section 8(a)(1) of the Act by demanding that the Union stop handbilling on Sears' property, or by threatening the handbillers with arrest if they continued to handbill on its property.

2. Respondent Macomb Mall has not violated Section 8(a)(1) of the Act by imposing a liability insurance requirement on the Union as a condition of permitting the Union to handbill on the mall's property.

ORDER

The complaint is dismissed as to Respondents Sears and Macomb Malls.

Dated, Washington, D.C. April 12, 1995

James M. Stephens, Member

Charles I. Cohen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER TRUESDALE, dissenting.

For the reasons set forth in Member Browning's and my joint dissent in *Loehmann's Plaza II*,[1] I would not apply the access analysis of *Lechmere, Inc. v. NLRB*[2] to this case, where employees engaged in consumer boycott handbilling. I believe that *Lechmere's* rationale is properly limited to nonemployee organizational activity on an employer's private property. I would apply a traditional access analysis and would reaffirm the Board's prior holding that Respondent Sears violated Section 8(a)(1) of the Act by prohibiting the Union's consumer boycott handbilling on its property and that Respondent Macomb Mall violated Section 8(a)(1) by imposing a liability insurance requirement as a condition of permitting the Union to conduct consumer boycott handbilling on its property.

Contrary to my colleagues, I would find that the Union had no reasonable nontrespassory means of communicating its consumer boycott message to its intended audience, Sears' customers and potential customers. The Sears' stores where the Union attempted to handbill were located in 2 enormous shopping malls containing 92 and 144 stores, respectively. The mall buildings at each location were surrounded by extensive privately owned parking areas bordered by heavily traveled thoroughfares. Given the massive size of each mall and its surrounding parking areas; the large number of stores at each mall; the distance from the bordering public thoroughfares to the Sears' stores within the malls; and the speed and volume of traffic on those thoroughfares, I would join the administrative law judge's and the Board's finding in *Oakland Mall I*[3] that handbilling at the malls' perimeters did not constitute rea-

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[1] 316 NLRB No. 24 (Jan. 25, 1995). See also the dissent in *Leslie Homes, Inc.*, 316 NLRB No. 29 (Jan. 25, 1995).

[2] 502 U.S. 527 (1992).

[3] 304 NLRB 832 (1991).

sonable alternative means by which the Union could communicate its message.[4] I would also agree with the Board and the judge in *Oakland Mall I* that picketing would not constitute a reasonable alternative means of communication. Sears, although "at the fulcrum of the dispute."[5] was technically a secondary party to the dispute, and such picketing could subject the Union to an 8(b)(4)(B) charge.

My colleagues now place an even greater burden on the Union. They would require the General Counsel to show that various means of mass communication, such as newspapers, radio, or television, did not constitute available alternative means of communication for the Union's message. Relying on *Lechmere*, they overrule Broad precedent holding that "generally it will be the exceptional case where the use of newspapers, radio, and television will be feasible alternatives to direct contact."[6] I do not concur in this reversal of sound precedent.

Even if *Lechmere* were applicable to this case, I would not find that *Lechmere* compels such a result. My colleagues rely on the Court's broad reference to "the ordinary flow of information that characterizes our society."[7] In fact, however, the Court acknowledged but *refrained* from overruling the Board's specific finding that, because newspaper advertisements placed by the union were ex-

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[4] The Board found that handbilling from the highway medians and left turn "jughandles," the parking lot entrance medians, or the public easements between the bordering highways and the parking lots would have been fruitless and dangerous. Id. at 833 fn. 8 and accompanying text, and 841-842.

[5] Id. at 833 fn. 9 and 841.

[6] *Jean Country*, 291 NLRB 11, 13 (1988).

[7] 502 U.S. at 540.

pensive and might not reach employees, they were not a reasonably effective alternative means of communication.[8]

Moreover, use of mass media has abundant shortcomings—expense and remoteness—that justify the Board's presumption that it does not provide a reasonable alternative means for unions to communicate with customers or potential customers of an employer. As the court of appeals recognized in *Giant Food Markets v. NLRB*,[9] a case concerning area standards picketing of a retail store:

> When the consumers potentially come from a large metropolitan area and cannot be categorized as a specific group patronizing a specific type of store, expensive, extensive mass media or mailer campaigns should not be required. If reasonableness is a criterion for determining whether or not an alternative means of communication exists, the union should not be forced to incur exorbitant or even heavy expenses. A mass media campaign would also diffuse the effectiveness of the communication by being physically removed from the actual location of the store whose policies are at issue and would prevent any personal contact between the union and the intended audience.[10]

Although the ordinary flow of information may indeed characterize our society, the ability to place particular information in this flow is not equally available to all.

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[8] "Whatever the merits of that conclusion," the Court stated, "other alternative means of communication were readily available." Id.

[9] 633 F.2d 18 (6th Cir. 1980), denying enf. on other grounds 241 NLRB 727 (1979).

[10] Id. at 24-25; see also *Sentry Markets*, 296 NLRB 40, 43 (1989), enfd. 914 F.2d 113, 117 (7th Cir. 1990); *Scott Hudgens*, 230 NLRB 414, 416 fn. 22 and accompanying text (1977), citing *Scott Hudgens*, 205 NLRB 628, 631 (1973).

In the realm of mass media, many large corporations that sell consumer goods or services, such as automobiles, medications, or long-distance telephone service, for example, devote vast sums to extensive advertising to establish awarenes of their products in the consciousness of virtually all television viewers, radio listeners, and newspaper readers. Unions, however, are not commercial enterprises and lack the means to undertake mass media advertising, at least on the scale needed to instill their message into the minds of their audience. This imbalance is so patent that I would not require unions to prove in every access case that mass media is not a reasonable alternative means of communication. Here, although the Sears' stores may effectively reach their potential customers through mass media advertising, it is folly to presume that the Union could convey its message to potential Sears' customers through similar means. Moreover, even if cost were not a barrier, it is doubtful that many broadcasting companies or newspapers would accept advertising bearing the "do not patronize" messages that unions often wish to convey, such as the one displayed on the handbills that the Union attempted to distribute here.

In sum, I find that the Union could not reasonably convey its message to its intended audience through handbilling or picketing from public property at the perimeters of the two shopping centers, and I dissent from my colleagues' reversal of Board precedent holding that mass media is presumptively not a feasible alternative means for a union to convey its message. I would reaffirm the Board's holding in *Oakland Mall I* that Respondent Sears violated Section 8(a)(1) by prohibiting the Union's consumer boycott handbilling on its property and that Respondent Macomb Mall violated Section 8(a)(1) by imposing a liability insurance requirement on the Union as a condition of permitting it to conduct consumer boycott handbilling on its property.

Dated, Washington, D.C. April 12, 1995

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. These consolidated cases were heard in Detroit, Michigan, on January 25, 26, and 27, 1989, based on unfair labor practice charges filed on August 18 and September 9, 1988, by Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union), complaints issued by the Regional Director for Region 7 of the National Labor Relations Board (the Board) on September 27 and October 24, 1988, and an order consolidating cases which issued on October 26, 1988. The complaints allege that Oakland Mall, Ltd., Macomb Mall Associates, a Limited Partnership, and Sears, Roebuck and Co. (individually Oakland Mall, Macomb Mall, and Sears and collectively Respondents) prohibited the Union from engaging in handbilling activities on property owned by each of them, in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). Respondents' timely filed answers denying the commission of any unfair labor practices.

All parties were afforded the opportunity to examine and cross-examine witnesses, introduce evidence, argue orally, and submit posthearing briefs. Briefs were submitted on behalf of all parties.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the parties' briefs, I make the following

FINDINGS OF FACT

I. THE EMPLOYERS' BUSINESSES AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Oakland Mall, a Michigan corporation, is engaged in the operation of a retail shopping center in Troy, Michi-

[1] The unopposed motions to correct the transcript are granted.

gan. In the course and conduct of its business operations, it annually derives gross revenues in excess of $500,000 and purchases and causes to be shipped to its Troy, Michigan place of business goods and materials valued in excess of $50,000 directly from points located outside the State of Michigan. Oakland Mall admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Macomb Mall, a Michigan corporation, is engaged in the operation of a retail shopping center in Roseville, Michigan. In the course and conduct of its business operations, it annually derives gross revenues in excess of $500,000 and purchases and causes to be shipped to its Roseville, Michigan place of business goods and materials valued in excess of $50,000 directly from points located outside the State of Michigan. Macomb Mall admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Sears, a New York corporation, is engaged in the retail sale and distribution of clothing, household goods, appliances, and related items at its stores which are located throughout the United States, including stores in Troy and Roseville, Michigan, the only facilities involved in the instant proceedings. In the course and conduct of its business operations at each of the Michigan stores involved herein, it annually derives gross revenues in excess of $500,000, and annually purchases and receives goods and materials valued in excess of $50,000 which were shipped directly from points located outside the State of Michigan. Sears admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondents have stipulated, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background—The Union's Dispute and Object*

For a number of years, Sears had a contract with Ryder DPD to provide home delivery services. Ryder's 80 to 100 employees were represented by the Union. When Sears canceled its contract with Ryder in July 1988,[2] retaining Leaseway Trucking in its place, the Ryder employees were laid off. Leaseway hired only a few of those employees and has no agreement with the Union.

In August, the Union decided to handbill the Sears' stores in the Oakland and Macomb Malls in an effort to win customer sympathy and support for its efforts to get Sears to reinstate Ryder and thereby return its members to the jobs which they had lost. The handbill, distributed on each instance described hereafter, read:

> ATTENTION SHOPPERS
>
> PLEASE do not shop at this . . . .
> Sears & Roebuck Store!
>
> Sears no longer uses a Company that employs Local 243 Members to deliver merchandise.
>
> As a result, (100) One Hundred Members of Local 243 have lost their jobs. Our Members need your help to get their jobs back.
>
> Thank You . . . .
> Teamsters Local No. 243

In each instance, the handbillers were instructed not to roam about or prevent anyone from entering the store, to be polite, and to tell anyone who asked that they were trying to get their jobs back. There is no evidence in this record that the handbilling was conducted in any way inconsistent with these instructions. While the handbillers asked shoppers to refrain from shopping in the

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[2] All dates hereinafter are 1988 unless otherwise specified.

Sears' stores, the Union's witnesses professed to be asking customers to speak on their behalf with Sears' management. The handbillers, who were, for the most part, former Ryder employees, were given no instructions regarding their presence on, or avoidance of, private property.

The handbilling was directed solely at Sears' customers; there was no attempt to organize or otherwise reach the employees of Sears, Oakland Mall, or Macomb Mall, whether unionized or not. Neither of the malls was involved in the underlying dispute. There were no signs or sandwich boards used and there was no picketing.

B. *Sears and Oakland Mall*

1. The properties

Oakland Mall is located at the junction of 14 Mile and John R Roads in Troy, Michigan, just off of interstate 75. It is an enclosed mall, consisting of three major department stores, Sears, Penney's, and Hudsons, located at the ends of wide, streetlike aisles, complete with trees, plants, and benches. About 140 smaller specialty shops line the aisle. Sears, the largest store in the mall, was built before the mall as a freestanding store and is now joined at the mall's eastern wall. There is a single wide entrance into Sears from the inside of the mall on the ground floor. There are also approximately eight entrances, consisting of either double or quadruple doors into the various departments from the sidewalk surrounding Sears. Sears owns, provides security for, and pays taxes on its own building, the sidewalks around it, the area adjacent to the mall entrance extending 12 feet into the mall, and the parking lot adjacent to the Sears' store, extending at least several hundred feet to the public easement between the parking lot and the roads.

While there are no signs or other markings indicating the ownership or the property lines, there are no-

solicitation signs at each of the Sears' entrances. Those signs, consistent with Sears' policies, read:

NOTICE TO THE PUBLIC

SOLICITATION OR DISTRIBUTION OF HANDBILLS—CIRCULARS, ETC. PROHIBITED ON THESE PREMISES WITHOUT PRIOR PERMISSION.

SEARS, ROEBUCK AND CO.

Pursuant to this policy, Sears at Oakland Mall has not permitted any solicitations, even for charitable purposes, except for a limited number of Christmas bell ringers, to be conducted on its property.

Surrounding the mall are parking lots; the portion owned and maintained by Sears has a capacity of more than 3000 cars, the portion owned and maintained by Oakland Mall has space for about 8800. Abutting the parking lots are public easements, paved or grass covered, which are between 12 and 20 feet wide. Both 14 Mile and John R Roads are heavily traveled, divided thoroughfares, six and four lanes respectively, with 40-mile-per-hour speed limits.

Along 14 Mile Road, to Oakland Mall's south, there are two entrances to the parking lots. The easternmost entrance, designated entrance number one, follows the property line between Sears and the mall. It serves both lots and is used by customers going to either the mall in general or Sears in particular. It is the most convenient entrance for customers approaching Sears from 14 Mile Road. Overhead is a sign pointing to Sears with no designation of the mall or other stores on it. There does not appear to be a median strip, on either public or private property, in the center of that entrance driveway. There is a narrowing of the median strip on 14 Mile Road, referred to as a "jughandle," and a traffic light to facilitate east bound traffic in crossing the west bound lane to enter the parking lot at entrance number one.

To the west is an entrance to the mall parking lot, with a sign identifying Oakland Mall, Sears, and Hudsons, used by customers destined for any of the stores. At the junction of 14 Mile and John R Roads there is a pylon sign, identifying Oakland Mall, Sears, Hudsons, and Penney's.

Along John R, which runs north and south, there are five entrances to the parking lots. Four of these enter into Sears' property. Only the southern (number two) and northern (number five) entrances have median strips, small portions (8 feet) of which extend into public property. There is a traffic light at entrance number two, and a jughandle which can accommodate about 10 cars. There are also two buses which stop along John R, at entrance number two, and another which enters the parking lot and stops at the Penney's store.

Most (approximately 65 percent) automotive traffic enters the Sears' parking lots through entrance number one, along 14 Mile Road, and entrance number two, off of John R. The remainder of the traffic is fairly well distributed among the other three entrances. Sears does not prohibit persons intending to shop at other stores in the mall from using its parking lot or the entrances thereto; neither does Oakland Mall prohibit Sears' customers from using its parking lot and its entrances.

About 80 percent of Sears' customers enter that store through the exterior doors; the remainder enter from the mall. Some customers destined for other stores in the mall enter and cross through Sears. Sears contends that most of its customers are "single item shoppers" who come to the mall solely to shop at Sears, entering and using the parking lots nearest the Sears' department in which they intend to shop.

Sears and Oakland Mall are open for all but 3 days a year. Sears' hours are slightly longer than those of the mall stores but, when Sears is open, customers can enter the mall through the Sears' mall entrance.

2. Attempts to handbill Sears at Oakland Mall

On August 2, Thomas Ziembovic, an organizer for the Union together with about six laid-off Ryder employees, began handbilling at the Sears at Oakland Mall. Handbillers were stationed at the mall entrance, at the entrance from the parking lot to the women's department, and by the entrance to the service department; all were on Sears' property. At about 2 p.m., Marshall Dyke, Sears' operating manager for that store, was directed by his unit manager to determine if there were handbillers and solicitors at the store's entrances. He proceeded to the mall entrance, where he encountered two persons passing out union handbills. He told them that this activity was not allowed and that they were on Sears' property. They left, stating that they had not realized it was Sears' property.[3]

Dyke proceeded through the store to the women's department, observing handbills that customers had placed on the cash registers and end caps. He found three men handbilling at the women's department entrance and, when he told them that their conduct was not permitted, was referred to Ziembovic. He repeated his admonition to cease the distribution, referring to Sears' no-solicitation rule, and threatened to call the police if they did not leave. Ziembovic told him "to do what he had to do" and the handbilling continued.

About 1 or 2 hours later, the Troy police arrived. They spoke with Dyke and accompanied him to where

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[3] Ziembovic testified that there was no handbilling at the mall entrance; Dyke, however, observed handbillers there and ordered them off of the property. I credit Dyke who had no reason to fabricate this testimony. With six or more employees handbilling different points around Sears, it is distinctly possible that some of them chose, on their own and without Ziembovic's knowledge, to handbill at the mall entrance. It appears, from subsequent events, that they did not tell Ziembovic of their confrontation with Dyke.

Ziembovic and the Ryder employees were handbilling. At Dyke's request, the police ordered Ziembovic and the employees to leave Sears' property. When Ziembovic stated that they wanted to continue handbilling, the police officer replied that they could handbill at the easement around the property. However, Ziembovic was told that if they obstructed traffic or refused to follow police orders, they would be arrested.

3. Attempts to handbill in Oakland Mall

About midafternoon on August 2, Ziembovic, accompanied by one of the Ryder employees, went to the Oakland Mall office where he spoke with Don Pyden, mall manager. He told Pyden that the Union wanted to handbill Sears' customers at the entrance to Sears from the mall. According to Ziembovic, Pyden refused his request, stating that the Union could handbill at any of the Sears' exterior entrances, those being Sears' property, but could not handbill anywhere in the mall, including the area around the mall entrance, which, he erroneously claimed, was mall property. He allegedly threatened to call the police if the Union handbilled on the mall's private property. And, although Ziembovic did not express any interest in placing handbills on cars in the parking lots, Pyden allegedly added that the Union was not to do so because it would cause littering.

Pyden claimed to have merely said that, "I would rather he would not . . . pass out handbills," denying that he had refused permission to do so and denying that he made any reference to the parking lots. Pyden testified that he had no authority over Sears' property within the mall; however, he did not tell the Union that Sears was the owner of the first 12 feet outside its mall entrance. The Union made no further effort to handbill at the mall entrance.

Some time thereafter, Ziembovic called Douglas Mossman, one of the mall's principals, and repeated his re-

quest to handbill at Sears' mall entrance. According to Ziembovic, Mossman refused his request, stating that Sears owned its own property but not identifying the property line as being within the mall. He also rejected Ziembovic's query about placing handbills on cars in the parking lot, allegedly stating that he would make sure they ended up on the ground, constituting littering.

Like Pyden, Mossman claimed to have told Ziembovic that he only preferred that the Union not handbill on mall property. He further claimed to have identified the Sears' property line and to have stated that the Union could handbill on Sears' property and could distribute its handbills in the mall's parking lot as long as the handbills were not left on car windshields, where they would cause a littering problem.[4]

Notwithstanding that the General Counsel failed to call the employee who had accompanied Ziembovic to Pyden's office to corroborate Ziembovic's testimony, I am inclined to credit his recollection as against both Pyden's and Mossman's. It is not plausible that a union which was serious enough about a dispute to prepare a handbill, bring employees together to distribute it, continue its distribution on Sears' property even when ordered off, and seek permission to make that distribution on what it believed to be mall property would have refrained from doing so had it merely been told, "We would rather you didn't." Given such noncommittal answers as Pyden and Mossman claimed, Ziembovic would have gone ahead with the distribution. That he refrained from doing so, in the circumstances of this case, evidences that he was ordered not to do so.

On August 10, the Union wrote both Pyden and Douglas Mossman, "requesting permission to handbill at

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[4] That Mossman took the telephone call from Ziembovic at his office located at some distance from the mall, rather than at the mall as alleged in the compliant, is irrelevant and not a material variance from the pleadings.

the Sears' entrances at the Oakland Mall." Neither letter was answered. Both Mossman and Pyden testified that they did not reply because they interpreted the letter to be seeking permission to handbill on Sears' property, not Oakland Mall's.

4. The Union's alternatives

The Union did not return to handbill at the Oakland Mall or Sears after August 2. Neither did it attempt, on that or any other day, to distribute its handbills from the public easement around the parking lots, the public easement portion of the medians in entrances numbers two and five off of John R Road or the median strips and jughandles on 14 Mile or John R Road, areas which Respondent Sears contends are suitable for the Union's distribution.

In addition to the speed of the traffic around the mall making distributions at the roads ineffective or dangerous, Ziembovic pointed out that a person attempting to pass out literature from the easements along the adjacent roads would be on the passenger side of any passing car, making it virtually impossible to hand a leaflet to a driver even if the car slowed down and the window was open. Standing on the median in those roads, or on the jughandles, might enable a distributor to reach a driver who had slowed or stopped to turn into the mall but risked arrest for obstructing traffic, as threatened by the police. Similarly, an attempted distribution from the medians in entrances numbers two and five would have required a distributor to stand within approximately 8 feet of the public easement and would have required a driver to stop immediately on turning into the driveway in order to accept a handbill, thus risking an accident for himself and posing a risk of arrest for the distributor. Moreover, if it had attempted to make its distribution from this point, or from the medians, jughandles, and easements which were in, alongside of, or at the junction of the two roads, where charitable solicitations have taken place,

the Union would not have been able to distinguish between those shoppers going to Sears and those going elsewhere.

C. *Sears and Macomb Mall*

1. The properties

Macomb Mall is located in Roseville, Michigan, bounded by Masonic Boulevard on the south, Beaconsfield on the west, and Gratiot Avenue on the east. Gratiot is a divided multilane thoroughfare, with a 35-mile-per-hour speed limit, with one entrance into Sears' parking lot just north of the junction of Gratiot and Masonic. There is a traffic light and jughandle at that entrance. Two additional entrances to the mall's parking lot, further away from the Sears' store, also come off of Gratiot. There are three entrances to the Sears' parking lot off of Masonic, a 30-mile-per-hour roadway, none of which are protected by traffic lights, and two off of Beaconsfield, one of which enters on the Sears' lot and another which goes into the mall's lot further north. There are bus stops in the mall's parking lot and another along Gratiot. About 40 percent of drivers heading into the Sears' lot use the first entrance on Gratiot with the balance divided roughly evenly among the other entrances. The mall is surrounded by a public easement, 15 to 20 feet wide and hard surfaced, which is maintained by the city.

Macomb Mall consists of an enclosed structure of approximately 940,000 square feet, surrounded by acres of a parking lot. Sears, the largest store in Macomb Mall, and the mall itself were built and opened for business simultaneously. In addition to Sears, the mall contains 1 or 2 smaller department stores and about 90 specialty shops, occupying leased space. The department stores are at the ends of the mall's streetlike aisles along which are the specialty shops.

The entire mall, including Sears, is open to the public 362 days a year, for substantial portions of each day. Sears' hours are slightly longer than those of the other stores in the mall.

Sears owns and controls the property on which it sits from the mall entrance to the easements around its parking lot. Sears' parking lot holds about 1500 cars and, according to Sears' witnesses, Sears' shoppers tend to be single-item shoppers who park and enter nearest the department in which they intend to shop. Macomb Mall's parking lot holds about 4600 cars. Sears' shoppers are not precluded from parking in the mall's lot and entering the mall through any of its doors. Conversely, customers for other stores may park in Sears' lot and enter through Sears.

About 20 percent of Sears' customers enter that store from the mall. The remainder enter from the sidewalk around Sears through doors into the various departments. These entrances vary from single door width at the automotive department, to double doors into the catalogue, optical/financial, and sporting goods departments, with a four door wide entrance to the women's wear department. The mall entrance is wide enough for several people to enter or leave side by side.

2. No-solicitation rules

As at Oakland Mall, Sears has a no-solicitation rule in effect at Macomb Mall and signs, identical to those at Oakland Mall, are posted at each entrance. At the time of these events, several of the permanent signs may have come down and been replaced by temporary signs in the vestibules. Sears rigidly enforces this rule at Macomb Mall, not even allowing Christmas bell ringers on its property.

Macomb Mall also has a policy with respect to non-tenant activities, including solicitations, petitioning, and vending. That policy requires that an interested organiza-

tion first complete an application describing the activity, sign both a "Hold Harmless & Indemnification Agreement" and an agreement to abide by the rules established for such activities, and provide a certificate of insurance establishing that Macomb Mall has been named as an additional insured under a liability policy carrying a minimum coverage of $500,000 for each occurrence of bodily injury. Similar insurance is required of the mall tenants. After meeting these requirements, numerous organizations have held shows, exhibits, and fundraisers in the mall.

Sheldon Peven, Macomb Mall's insurance consultant, reviews the mall's insurance requirements and the policies provided under it. He testified that he deems this to be an advisable practice for the mall, one which the mall has historically required, in order to protect the mall and its tenants from liability arising from accidents and altercations. In addition to securing insurance coverage, Macomb Mall uses the application procedure to schedule events and avoid conflicts. The policy has uniformly been required of all outside groups, including those making charitable solicitations or educational presentations.

3. Handbilling at Sears at Macomb Mall

The Union began handbilling Sears at Macomb Mall on August 9. The handbilling continued on the morning of August 10 with handbillers at the interior mall entrance and at exterior entrances on all three sides of the Sears' store. The handbilling at the customer service entrance, one of the busier doors, was observed by the store's manager, Gary Crawford, who directed Margaret Lauretti, the loss prevention supervisor, to exclude them. She told the two men at that door that they were on private property and would have to leave or the police would be called. They left. However, when similar instructions were given to handbillers at other doors, they refused to leave. Sears called the local police and the handbillers left when ordered to do so under threat of arrest. The Union returned about September 7 and

resumed handbilling at the mall entrance and at several of the exterior doors. Once again, Sears' supervisors or managers ordered them to vacate Sears' property and called the police when the handbillers refused. The police, threatening arrest, ordered them to leave and the Union complied.

When ordered by the police to leave Sears' property, Gregory Lowran, the Union's business representative, asked where their activity would be permissible. He was told that they could go to the easements around the property. However, the police told him, if the handbillers went off the easement and handbilled in the street, they would be arrested for obstructing traffic. The Union left and has not attempted to handbill at Sears in Macomb Mall since early September.

4. Handbilling in Macomb Mall

As noted above, the Union commenced its handbilling activity at the Sears store in Macomb Mall on August 9, with several handbillers on mall property at the Sears entrance and others on Sears' property outside the mall. During the course of that activity, the handbillers who had been at the mall entrance were told to stop their distribution. They called Lowran and reported that someone from the mall had said they needed permission in order to continue. He directed them to disregard the order and continue, which they did for a brief period longer, until they ran out of bills.

On hearing from the handbillers, Loran called Macomb Mall's office. Speaking with Janet Lewis, secretary to Mall Manager Nancy Lamphear, he asked whether permission was required to handbill in Macomb Mall. According to Lowran, she replied that he would have to send Lamphear a letter stating the Union's request. On August 10, Arthur Brown, one of the former Ryder employees, delivered a letter to the office, "requesting permission to handbill all the Sears' entrances at the Macomb

Mall." When he delivered it, he was told about an insurance requirement.[5] Brown called Lowran and related what he had been told about insurance.

Lowran immediately called the mall's office and was told by Lewis that the Union could not handbill until it completed the application form and gave the mall proof of a $1 million insurance policy. He asked to speak to someone higher up and was referred to Joe Thomas, property manager for Shostak Bros., managing agent for Macomb Mall. Lowran next received a call from his handbillers, reporting that the police had come, ordered them off the property and prohibited them from placing their bills on cars in the parking lot. Lowran told them to comply with the police orders in order to avoid arrest.

Lowran called Thomas on August 10 or 11, asserted the Union's right to handbill and questioned the insurance requirement. Thomas explained that everyone coming into the mall to sell, display, or solicit was required to complete the application form and have a $1 million liability policy. If they fulfilled these conditions, Thomas stated, the Union could distribute its handbills and place them on cars in the parking lot. On August 11, Lowran received a set of Macomb Mall's application forms. At some point, he also received a small sheet of blue paper, detailing the insurance requirements at levels one-half of what he had been told was required.[6]

Lowran made several calls to union officers and to the Union's insurance representative and, he testified, was unable to secure the necessary insurance. He was told

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[5] It is immaterial whether he delivered the envelope to Nancy Lamphear, as he testified he had done, or to Janet Lewis or Debbie Eavers as Lamphear's testimony would indicate. All three had authority to order the Union not to handbill without completing the mall's application requirements.

[6] Macomb Mall's representatives testified that, while the written instructions only required a $500,000 liability policy, it was their practice to orally state that $1 million coverage was required.

that no such insurance was available.[7] On August 26, he submitted the completed application, together with the signed regulations and the "Hold Harmless Agreement." He did not submit proof of the required insurance.

The Union's last attempt to handbill at Macomb Mall occurred on approximately September 7. Ryder employee Brown handbilled in the mall at the Sears entrance for about 1½ hours. He left when the police came. On that same date, Lowran was ordered to stop handbilling by a Macomb Mall security officer and by personnel in the mall's office. He was also given another application package and it was made clear to him that the Union could handbill and place the handbills on cars in the parking lot if the entire application procedure, including the insurance requirement, was satisfied.

5. The Union's alternatives

According to Gary Crawford, Sears' store manager at Macomb Mall, most Sears shoppers enter the store to purchase a single item, parking closest to the department carrying that item. Moreover, he testified, 40 percent of Sears shoppers at Macomb Mall enter the parking lot at the first driveway off of Gratiot where both north and south bound cars can turn in. Crawford also testified that he has observed charitable solicitations being made from the easement around the parking lots. Thus, he contended, that easement afforded ample opportunity for the

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[7] Peven, the Mall's insurance consultant, testified in response to the administrative law judge's questions that a liability policy such as the Union might carry would generally cover its entire operation. The Union should have been able to get the necessary rider or certificate covering a third party for a fairly nominal cost, at least if the activity was to last for only a few days. Most insurance agents, he said, would be aware of the procedure. It was conceivable, he acknowledged, that the Union's policy might not provide such coverage. In that case, a separate policy would be more expensive. No other witnesses with any experience in the insurance industry were proffered by any of the parties.

Union to distribute its handbill without entering upon Sears' property.

The Union did not attempt to handbill from the easement or the medians in the abutting roads. It did not do so, Lowran testified, because the police had threatened them with arrest if they went into the roadways and obstructed traffic. Additionally, he noted, a handbiller standing on the easement would be on the passenger side of any passing car, the traffic was heavy and moved at high speeds, and a car containing a Sears customer could not be distinguished from one containing shoppers destined for other stores.

D. *Analysis*

1. The analytical framework

In *Fairmont Hotel*, 282 NLRB 139 (1986), the Board had announced a new test for access cases. Pursuant to that test, the strength of the Section 7 rights being claimed would be weighed against the strength of the property right involved, with the stronger right prevailing. Only where those rights were relatively equal in strength would the availability of alternative means of communication become determinative. In *Jean Country*, 291 NLRB 11 (1988), the Board considered relevant precedent and its experience under *Fairmont* and held that the "availability of reasonable alternative means of communication must be considered in every access case, in conjunction with a consideration of the Section 7 rights and the property rights involved." *Target Stores*, 292 NLRB 933, 934 (1989).

In *Jean Country*, the Board noted that its essential concern in all access cases will be "the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted." *Mountain Country Food Store*, 292 NLRB 967 (1988). It iden-

tified numerous factors relevant to assessing the relative weights of the competing rights and the availability of alternative means.

Thus, the Board noted that included among the factors relevant to weighing the property rights are "the use to which the property is put, the restrictions, if any, imposed on public access to the property, and the property's relative size and openness." "[D]enial of access," the Board stated, "will more likely be found unlawful when property is open to the general public than when a more private character has been maintained."

Relevant to consideration of the Section 7 right, the Board held, is "the nature of the right, the identity of the employer to which the right is directly related (e.g., the employer with whom a union has a primary dispute), the relationship of the employer or other target to the property to which access is sought, the identity of the audience to which the communications concerning Section 7 rights are directed, and the manner in which the activity related to that right is carried out."

Finally, the Board noted that "the desirability of avoiding the enmeshment of neutrals in labor disputes, the safety of attempting communications at alternative public sites, the burden and expense of nontrespassory communication alternatives, and most significantly, the extent to which exclusive use of nontrespassory alternatives would dilute the effectiveness of the message" are among the factors to be considered in evaluating alternative means.

These factors are, to a certain extent, interdependent, and a given factor may be relevant to more than one inquiry. "[T]here is no simple formula . . . ." *Jean Country*, supra, at 14.

2. The property rights

a. *Sears*

Sears, as owner of its own properties, unquestionably has legitimate property interests. In furtherance of those interests, the properties are posted against solicitations and distributions and Sears enforces those restrictions as against virtually all those who would engage in such activities. The nondiscriminatory enforcement of such rules tends to make Sears' property interests more substantial that those of a similarly situated retail enterprise without any restrictions. *Target Stores*, supra.

However, since Sears maintains large stores surrounded by sidewalks for the use of the general public, invites the general public to enter upon its property through any of a number of adequately sized entrances, whether to shop, browse the merchandise or simply to pass through on the way to other stores, and permits anyone to drive through its ample, open parking lots from multiple unrestricted entrances and park thereon, whether shopping at Sears or elsewhere in the malls, its property interests are less substantial than those of an employer in a more private nonretail setting. *Target Stores,* id. at 935. Cf. *L & L Shop Rite*, 285 NLRB 1036 (1987), where a supermarket in a small shopping center, sharing the parking lot with several other stores, but imposing no restrictions on access to the parking lot or the sidewalk in front of its store, was held to have only a limited, relatively modest, property right. But cf. *Sisters Chicken & Biscuits*, 285 NLRB 796 (1987), where the owner of a freestanding single facility with its own parking lot provided for the convenience of its customers was held to have a substantial private property interest.

b. *Oakland Mall*

Like Sears, Oakland Mall has established a legitimate property interest in the mall and surrounding parking lot.

Its property right, however, is a relatively weak one. Thus, the mall covers a large area, consists of approximately 140 stores, and is open to the public 7 days per week for substantial portions of each day. With wide, tree and bench lined walkways, numerous entrances, ample parking and other public access, it is intended to attract and attracts large numbers of people each day; indeed, the success of the retail enterprises to whom it leases space is dependent upon its doing so. There is no evidence that Oakland Mall imposes restrictions upon the use of the property; no reference was made, either when the Union sought permission to handbill or at hearing, to any no-solicitation or no-distribution rules. As in *Jean Country*, the mall has intentionally been given certain quasi-public characteristics which "tend to lessen the private nature of the property, because it is apparent that the public is extended a broad invitation to come on the property, and not necessarily with the specific purpose of purchasing a particular product or service."

c. *Macomb Mall*

The only distinctions between Macomb and Oakland Malls are Macomb Mall's nondiscriminatory maintenance of a requirement that exhibitors, solicitors and the like complete an application, sign "hold harmless" agreements and provide proof of substantial insurance designating the mall as an additional insured party, and the evidence that Macomb Mall has permitted a wide range of outside non-retail activities to occur in the mall. In all these characteristics, Macomb Mall operates in essentially the same manner as Brook Shopping Center, the mall in which Jean Country was located. The Board found Brook to have only a weak property right; Macomb Mall's is no stronger.

3. The Section 7 right

The Union's handbilling was directed at Sears' customers, not its employees, and had no organizational objectives. Neither did it purport to protest any unfair labor

practice by Sears or to apply economic pressure upon Sears or any other employer with whom it was engaged in ongoing collective bargaining. It was not, therefore, primary union activity constituting a core Section 7 right. See *Sears, Roebuck & Co. v. San Diego County Council of Carpenters*, 436 U.S. 180, 206 fn. 42 (1978); *W. S. Butterfield Theatres*, 292 NLRB 30, 32-33 (1988).

On the other hand, the handbilling was directed at securing the reemployment of the Union's members and the handbilling sought to apply pressure at the fulcrum of the dispute, Sears, whose actions, directly or indirectly, brought about their unemployment and could similarly bring about their reemployment. It was somewhat akin to the "struck product" consumer handbilling recognized by the Supreme Court in *NLRB v. Fruit Packers Local 760*, 377 U.S. 58 (1964), as a protected activity and found by the Board in *Mountain Country Food Store*, supra, to be a relatively strong Section 7 right. At the very least, such handbilling stands on the same footing as the area standards activity involved in both *Jean Country* and *Target Stores*, not at the stronger end of the "spectrum" of Section 7 rights, but most certainly valid Section 7 rights, worthy of protection against substantial impairment. Moreover, those members whose jobs were at stake personally participated in the handbilling and the handbillers were limited in number, peaceful and unobstructive. By handbilling at the entrances to Sears, they remained in close proximity to Sears' customers so that it can be said that "the Union could not have more carefully restricted its activities to reach the intended audience while not disturbing others." *Target Stores*, supra at 935. Nothing the handbillers did diminished the strength of their Section 7 right.

4. The Union's alternatives

Turning finally to the third factor in the equation, I must conclude that, contrary to the contentions of Respondent Sears, the Union had no reasonable alternatives,

under the circumstances, to conducting its handbilling at the Sears' entrances, on Sears' property or on the property of Macomb Mall, immediately adjacent to the Sears entrance.

Sears suggests that the Union could have handbilled from the public easements around its properties, particularly at the driveway entrances. Had they done so with any hope of being at all effective, the handbillers would have been required to step into the street to deliver their message to the drivers' sides of the cars and would simultaneously have required most of those drivers to at least slow down to receive the handbill. Given the prevailing speed limits and the amount of traffic the surrounding roads carry, this would have posed both a serious safety hazard at virtually all of the points where the activity would have had to take place and a very real risk of arrest for obstruction of traffic, as the Union was expressly warned by the police at each mall.

Had the handbillers refrained from stepping into the streets, they would have been unable to reach most cars, at least from the public easements, as they would have been standing on the passenger side of any passing vehicle. They would also have been unable to explain their situation to potential Sears shoppers, rendering their message less effective. In this regard, I note that the Union's message was fairly detailed, certainly more complex than "nonunion" or "on strike," and required some explication by the handbillers. Moreover, even assuming that the message was readily understandable by reading the handbill, the Union could not have communicated it to passing motorists from a picket sign placed on the periphery of the property without substantial fear that it would have been subjected to unfair labor practice charges.

Sears shoppers may, indeed, be single item shoppers and 65 percent of them at Oakland Mall may enter through entrances numbers one and two, off of 14 Mile

and John R, respectively. However, entrance number one is the property line between Sears and the Oakland Mall and clearly would be a main entrance for mall shoppers as well as those destined for Sears. Even if the Union could safely, effectively and without fear of arrest have handbilled from public property abutting those two entrances (all of which is doubtful), it would have been unable to communicate verbally with the shoppers and would have missed 35 percent of the auto traffic going in to Sears as well as the 20 percent which enters through the mall, substantially diluting its message. It would also have enmeshed a substantial number of mall shoppers in the dispute.

Similarly, had the Union sought to handbill from public property alongside the two busiest entrances to Sears at Macomb Mall, it would have reached, at best, 40 percent of the cars entering the Sears' lots, missing 60 percent plus all those customers (20 percent) who enter from the mall. It would also have been unable to distinguish Sears' shoppers from those going elsewhere in the mall and would necessarily have enmeshed mall shoppers in its dispute.

The Union did not attempt to handbill from the public easements surrounding each of the malls. It was not required to attempt that which simple observation and common sense indicates would be, as I find, both fruitless and dangerous. *Emery Realty Inc. v. NLRB*, 863 F.2d 1259 (6th Cir. 1988).

E. *Conclusions*

1. Sears

Sears' property interests are not insubstantial; they are less than those of an employer in a more private non-retail setting but somewhat greater than those of a shopping center occupant who has not posted his own property with no-solicitation rules. Here, those interests are bal-

anced against similarly substantial Section 7 rights and the absence of reasonable alternative means for the Union to exercise those protected rights. Applying the *Jean Country* analysis, I must conclude that those property interests are required to yield to the extent necessary to permit the Union's peaceful, limited, and unobstructive handbilling at the mall and other store entrances. Sears refusal to permit such handbilling on its property, I find, violates Section 8(a)(1) of the Act.

2. Oakland Mall

Oakland Mall contends that, even if I find (as I have) that it refused to allow the Union to handbill on its property, no violation can be found inasmuch as the Union had a reasonable alternative for effective communication, handbilling within the bounds of Sears' property both at the mall entrance and outside Sears' store.

I would find this argument persuasive if the Sears' property was clearly marked instead of being held out as mall property, if the mall's representatives had made clear where that property line was, and if the Union had not been threatened with arrest for handbilling on Sears' property. The key under *Jean Country*, id. at 14, is the "availability of a reasonably effective alternative means" of communication. Given the lack of a clear delineation of property lines and Sears' refusal, albeit unlawful, to allow handbilling on its property, I must find that, at that time, the Union had no reasonably effective alternative avenues of communication to the Sears customers other than handbilling on Oakland Mall's property in the vicinity of the mall entrance to Sears.[8] Accordingly, I

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[8] If my Order with respect to Respondent Sears is ultimately upheld and compliance therewith is secured, or if Sears voluntarily concedes the Union's right to handbill on its property, the fact that Sears owns 12 feet of property into the mall from which the handbilling could take place might obviate Oakland Mall's obligation to permit the Union's presence on its property.

find that by rejecting the Union's request for permission to handbill at the Sears entrance in the mall, Respondent Oakland Mall violated Section 8(a)(1) of the Act.

Oakland Mall also rejected, or at least strongly discouraged, the Union from placing handbills on the windshields of cars on its parking lots. Given that these lots were not adjacent to the Sears store, that far more mall customers than Sears' shoppers would be the recipients of such a distribution, that the "Don't Shop at Sears" message would reach shoppers on their way out, when it would be less effective than if it had been received before the shopping was completed, and given the anticipatable littering problem, I do not find this prohibition to have been unlawful.

3. Macomb Mall

Respondent Macomb Mall asserts that it did not prohibit the Union from handbilling. Rather, it merely insisted that before the Union do so, it meet the standards nondiscriminatorily applied to all nontenant events. This, it argues, it had a right to do in the interests of providing a shopping environment conducive to shopper interest and comfort and protecting third parties from potential injury by outside entities.

General Counsel points out that, as noted above, Brook Shopping Center in which Jean Country was located had a similar requirement. In the context of seeking to limit union picketing in the event that it was to be determined that Jean Country and Brook had committed unfair labor practices by prohibiting the union's picketing in the mall, Jean Country requested that the union be required to post maintenance and insurance bonds before resuming picketing. The Board denied Jean Country's request, stating:

> Respondent Jean Country additionally requested that the Union be required to post maintenance and

> liability insurance bonds prior to picketing in the mall, implicitly relating the conduct of the Union's picketing to the conduct of the annual charity and arts and crafts fairs . . . We see a significant difference between the fairs, where between 40 and 75 tables are set up for the sale of merchandise and raffle tickets, and the limited picketing in this case. We also note the absence of any reasonable supporting rationale offered by the Respondent for restraining Sec. 7 activity in this way, and we can conceive of none. Accordingly, we deny the Respondent's request. [*Jean Country*, supra at 19 fn. 21.]

This conclusion is at least equally applicable to the instant situation where the Union sought to engage in handbilling, a less confrontational activity than picketing. I note, in this regard, that most of the events held at the mall during 1988 and subjected to the insurance requirement involved shows, displays, information centers, merchandise sales, and fund solicitations, all appearing to involve more people, blocking of the aisles and equipment than the Union's handbilling.

Similarly, I note that while Macomb Mall's insurance consultant recommended and approved of the mall's requirements, no substantial justification was offered. The possibility someone might trip over a handbiller or become so incensed that he or she would start a fight is remote, not significantly greater than the risk of similar incidents occurring between any two shoppers in the mall. Neither such remote risks nor the mall's desire to create a serene setting for the mall tenants' commercial enterprises, warrants such a burden [9] being imposed on the exercise of Section 7 rights, particularly in light of Macomb Mall's

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[9] I am satisfied that the Union made an adequate effort to comply with the mall's insurance requirement and found it burdensome. I do not believe that it can be required to engage in lengthy, fruitless and/or expensive searches for the coverage demanded as a condition of exercising statutory rights.

relatively weak property interest. Accordingly, I find that by prohibiting the Union from handbilling at the Sears entrance in Macomb Mall unless it adduced proof of insurance coverage naming Macomb Mall as an insured party, Macomb Mall has violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By demanding that the Union cease or refrain from engaging in protected handbilling activity on their properties, and by threatening it with arrest if the handbilling activities continued Respondents Sears and Oakland Mall have violated Section 8(a)(1) of the Act.

2. By imposing unreasonable restrictions on the Union's handbilling activities on its property, Respondent Macomb Mall has violated Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondents have not violated the Act in any other manner alleged in the complaints.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [10]

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[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondents, Sears, Roebuck and Co., of Troy and Roseville, Michigan, Macomb Mall Associates, a Limited Partnership, Roseville, Michigan, and Oakland Mall, Ltd., Troy, Michigan, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting representatives of Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO from peacefully handbilling at the entrances to the Sears, Roebuck and Company stores in the Oakland Mall and Macomb Mall, in Troy and Roseville, Michigan, respectively, or imposing unreasonable burdens upon the Union's exercise of its right to engage in peaceful handbilling at those locations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Respondent Sears, Roebuck and Company shall post at its stores in Oakland Mall and Macomb Mall copies of the attached notice marked "Appendix A." Respondent Oakland Mall shall post at its office in Oakland Mall copies of the attached notice marked "Appendix B." Respondent Macomb Mall shall post at its office in Macomb Mall copies of the notice marked "Appendix C."[11] Copies of the notices, on forms provided by the Regional Director for Region 7, after being signed by each Respondent's authorized representative, shall be posted by

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[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

each Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by each Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. June 2, 1989

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prohibit representatives of Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO from peacefully engaging in protected concerted activity by demanding that they not distribute handbills at the entrances to the Sears, Roebuck and Co. store, by threatening them with arrest if they remain on the property of Sears, Roebuck and Co., or by asking the police to arrest them if they do not leave.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

SEARS, ROEBUCK AND CO.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prohibit representatives of Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO from engaging in peaceful protected concerted activity by demanding that they not distribute handbills at the entrances to the Sears, Roebuck and Co. store in Oakland Mall, by threatening them with arrest if they remain on the property of Oakland Mall, or by asking the police to arrest them if they do not leave.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

OAKLAND MALL, LTD.

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT prohibit representatives of Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO from peacefully engaging in the protected concerted activity of distributing handbills at the mall entrance to the Sears, Roebuck and Co. store by demanding proof of liability insurance or by insisting that they leave the premises if they do not provide proof of such insurance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

MACOMB MALL ASSOCIATES,
A LIMITED PARTNERSHIP

APPENDIX C

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 7-CA-28367 and 7-CA-28446

OAKLAND MALL, LTD. and SEARS, ROEBUCK AND CO. and LOCAL 243, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

MACOMB MALL ASSOCIATES, a Limited Partnership and SEARS, ROEBUCK AND CO. and LOCAL 243, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO

August 27, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On June 2, 1989, Administrative Law Judge Michael O. Miller issued the attached decision. Respondent Macomb Mall Associates filed exceptions and a supporting brief, Respondent Sears, Roebuck and Company filed exceptions and supporting arguments, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record in light of the exceptions and briefs and has decided to affirm the judge's

rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

The judge found, inter alia, and we affirm, that Respondent Sears (Sears) violated Section 8(a)(1) of the Act by demanding that the Union cease or refrain from engaging in protected nonemployee customer boycott handbilling, aimed solely at Sears' customers and conducted on its property at the entrances to its Oakland Mall and Macomb Mall stores.[3]

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[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge that the Sec. 7 activity engaged in by the Union was "at the very least" as protected as the Sec. 7 activity engaged in by the union in *Jean Country*, 291 NLRB 11 (1988), which the judge incorrectly identified as "area standards" activity.

In adopting the judge's finding that Respondent Macomb Mall violated the Act, we also note Union Organizer Lowran's credited testimony that he attempted and was unable to obtain insurance on behalf of the Union conforming to Sears' demands.

[3] The Union's primary dispute was with Ryder DPD (not a party to this proceeding). Ryder previously had a contract with Sears under which Ryder provided home delivery services to Sears. Ryder had employed about 80 to 100 driver employees to perform this contract, who had been represented by the Union. Sears subsequently canceled its home delivery services contract with Ryder, and Ryder in turn laid off the 80 to 100 driver employees. The Union handbilled the Sears stores in question in an attempt to get customer sympathy and support for the Union's efforts to get it to reinstate Ryder for home delivery services. The handbills themselves requested customers not to shop at Sears, advised them that Sears no longer used a company (not identified) that employed union members to deliver Sears merchandise, informed them that 100 union members had lost their jobs as a result of Sears no longer using that company, and asked for the customers' help in getting the employees' jobs back. The handbillers were mostly former Ryder employees. None were employees of Sears.

Our colleague finds that Sears did not unlawfully deny the Union access to its property, essentially on the grounds that the General Counsel has not established that the Union lacked reasonable alternative means of communicating its message to Sears customers.[4]

Our colleague focuses on the fact that the Union did not actually attempt to handbill automobile traffic as it passed in front of the malls on the surrounding roadways and heavily traveled, 30- to 40-mile-per-hour divided thoroughfares surrounding the malls, or as that traffic turned from those roadways and thoroughfares and entered the mall parking lots. Thus, in contending that Sears lawfully prohibited the Union from engaging in handbilling on its property at the mall locations in question, our colleague relies on the absence of affirmative evidence of failed handbilling, at the perimeters of the malls, that would have conclusively established in our colleague's eyes that such perimeter handbilling could not have been effectively and safely carried on.

But it is well settled that, in showing that ostensible alternative means of reaching an audience are *not* reasonable alternatives, the General Counsel is not necessarily required to show that the party engaging in the Section 7 conduct *actually* attempted those alternative means and found them futile.[5] All that is required is a clear showing, based on objective considerations, that reasonably effective alternative means were not available in the circumstances.[6] We find, in agreement with the

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[4] Although our colleague asserts that the judge ascribed undue *weight* to the Union's Sec. 7 rights, he nevertheless does acknowledge that the Union's conduct is, in the final analysis, protected by the Act. Thus, the fundamental disagreement between our colleague and us is over the consequences of the Union's failure actually to attempt to handbill from the perimeter locations to which it had been relegated.

[5] *Jean Country*, 291 NLRB 11, 13 (1988).

[6] Id. See also *Target Stores*, 300 NLRB 964 fn. 2, 970 (1990); *Best Co.*, 293 NLRB 845 (1989).

judge and for the reasons fully discussed by him, that the General Counsel has made such a showing here.[7]

[7] The cases relied on by our colleague in this context are inapposite. *Providence Hospital*, 285 NLRB 320 (1987), involved, in relevant part, the reasonableness of *picketing*, not handbilling, near a busy highway. In *Skaggs Cos.*, 285 NLRB 360 (1987), the Board found that as a reasonable alternative to handbilling on the shopping center's parking lot in front of the primary employer's private store, the union reasonably could have communicated its area standards message to the public by "handbilling *and picketing*" (emphasis added), on the public sidewalk around the perimeter of the shopping center's property. In the instant case, however, as both the judge and our colleague recognize, *picketing* (as opposed to handbilling) to convey the Union's secondary consumer boycott message would have subjected the Union to an unfair labor practice charge. In any event, even in *Skaggs*, the Board expressly noted that the union would *not* necessarily have to show that it actually attempted and failed to communicate its message from the public sidewalk in order to *disprove* the reasonableness of that alternative. Also in *Skaggs*, the Board noted that there was no evidence that two other roads servicing the shopping center were not reasonable alternative means to the union's access to the respondent's property. In *L & L Shop Rite*, 285 NLRB 1036 (1987), the record established that the union actually had handbilled *and picketed* automobiles from the sidewalk adjacent to the public roads surrounding the shopping center, and the Board found that handbilling at that location "would *supplement the Union's picketing* as a means to convey its message." Id. at 1039 (emphasis added). Again, in the instant case picketing to convey the Union's message is not a lawful alternative. Finally, in *Homart Development Corp.*, 286 NLRB 714 (1987), the unions engaged in secondary handbilling at a shopping mall (Fiesta Mall) housing a department store which was utilizing a nonunion general contractor and subcontractors to build an additional store at another mall (Westridge Shopping Mall). Testimonial opinions varied about the relative safety of handbilling at the highway entrances to the Fiesta Mall. But beyond the controversial evidence of handbilling safety in *Homart*, the unions were able to effectively handbill at one public property entrance to Fiesta Mall for approximately 1 month. Almost immediately thereafter, the unions began communicating their message by picketing at the Westridge Shopping Mall where the general contractor and subcontractors were actually constructing the new store. Further, the pertinent principle of *Jean Country*, supra—which issued after *Homart*—remains unchallenged and is

Thus, we fully endorse—and see no need to restate or set forth here—the judge's thorough analysis of the "reasonable alternative means" aspect of this case (set forth in secs. II,B,4; II,C,5; and II,D,4 of his attached decision.[8] Consequently, we affirm the judge's well-reasoned finding that the Union had no reasonable alternative means to handbilling at Sears store entrances, on or (in the case of Sears mall entrance at Macomb Mall) immediately adjacent to Sears' property, to communicate its message.[9]

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applicable to the instant case: the General Counsel is not necessarily required to show that the party engaging in Sec. 7 conduct actually attempted alternative means of communication in order to establish their futility.

Thus, while it might be true, as our colleague suggests, that the "best" way to determine the efficacy of an alternative means of communication is to attempt it, it is clearly not the *only* way, and, more importantly for the purposes of our decision herein, it is certainly not, under the Act, the necessarily *required* way.

[8] We do, however, note particularly that the judge found, inter alia, that the distribution of handbills to passing automobiles from the public easements around the perimeter of Oakland and Macomb Malls, and from the traffic medians and "jughandles" in the thoroughfares abutting the malls, would have been both fruitless and dangerous because of the speed of the traffic. We agree with the judge's assessment of these circumstances. See *Sentry Markets*, 296 NLRB 40 (1989), enfd. 914 F.2d 113 (7th Cir. 1990); *W. S. Butterfield Theatres*, 292 NLRB 30 (1988).

[9] In reaching this result, we note our colleague's assertion that "a union is held to a higher standard" in attempting to establish an absence of reasonable alternative means to access to the property of a secondary employer. Our colleague's reliance on *Hardee's Food Systems*, 294 NLRB 642 (1989) and *Federated Department Stores*, 294 NLRB 650 (1989) as support for this assertion is unavailing on two counts. First, that assertion is neither expressed nor implied in either of those cases. Second, neither case is apposite to the situation presented in the instant case.

In *Hardee's*, the secondary handbilling which Hardee's lawfully prohibited on its private property was conducted at its three Terre Haute, Indiana stores. These stores were *15 miles* from Hardee's Brazil, Indiana store that was the actual situs of the union's primary dispute with Hardee's nonunion contractor, who was at that

Finally, we note that our decision herein compels no relinquishment of property rights. It directs only an *accommodation* of the recognized private property rights of Sears with the equally recognizable Section 7 rights of the Union. *Jean Country*, supra.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Sears, Roebuck and Co., Troy and Roseville, Michigan; Macomb Mall Associates, Rose-

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time engaged in construction work only at the Brazil store, and not at the Terre Haute stores. Indeed, at the same time that the union was being *prohibited* by Hardee's from engaging in secondary handbilling at the three stores in Terre Haute, where the primary employer was not even present, the union was being *permitted* by Hardee's to engage in continued primary handbilling of Hardee's nonunion contractor at the Brazil store itself, where the contractor was presently working.

In the instant case, by way of contrast with *Hardee's*, the secondary handbilling which Sears has unlawfully prohibited at its Oakland Mall and Macomb Mall stores was being conducted at what the judge has aptly characterized as "the fulcrum of the dispute, Sears, whose actions, directly or indirectly, brought about [the union members'] unemployment and could similarly bring about their re-employment."

In *Federated Department Stores*, the secondary handbilling which Richway lawfully prohibited at its Palm Beach Lakes and Military Trails stores did not even *commence* until *after* the primary employers (Richway's nonunion construction contractors) had completely finished their work on the Palm Beach Lakes and Military Trails projects and had gone from those jobsites. Indeed, the union in *Federated Department Stores* apparently made no effort to engage in primary or secondary handbilling or picketing at any location where the primary employer contractors were actually engaged in their work.

In the instant case, in sharp contrast to *Federated Department Stores*, Sears' merchandise sold at both its Oakland Mall and Macomb Mall stores was being delivered to customers by Sears' nonunion replacement for Ryder *during* the same time period that the Union was attempting to engage in its secondary handbilling *at* those stores—"the fulcrum of the dispute."

ville, Michigan; and Oakland Mall, Ltd., Troy, Michigan, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER OVIATT, dissenting.

Unlike my colleagues, I conclude Sears did not unlawfully deny the Union access to its property. In my view the General Counsel has failed to meet his burden under *NLRB v. Babcock & Wilcox Co.*,[1] of proving that the Union lacked reasonable alternative means of communicating with customers of Sears. Consequently, I find that the Union's right to engage in lawful secondary handbilling need not be accommodated at the expense of the Respondent's property rights.

The Union's primary dispute is with Ryder DPD, which laid off trucking employees represented by the Union after Sears canceled its contract with Ryder for home delivery services in July 1988. Sears replaced Ryder with Leaseway Trucking, which had no contract with the Union, and which hired only a few of the laid-off Ryder employees. The Union responded with a handbilling campaign directed at Sears' customers at the Oakland and Macomb Malls in Troy and Roseville, Michigan, respectively. The handbills, which urged Sears to reinstate the Ryder contract to win back members' jobs, contained the following message:

> ATTENTION SHOPPERS
> PLEASE do not shop at this . . .
> Sears & Roebuck Store!
>
> Sears no longer uses a Company that employs Local 243 Members to deliver merchandise.
>
> As a result, (100) One Hundred Members of Local 243 have lost their jobs. Our members need your help to get their jobs back.
>
> Thank you . . .
> Teamsters Local No. 243

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[1] 351 U.S. 105 (1956).

In addition to distributing the handbills, the former Ryder employees asked customers to speak on their behalf to Sears management.

Both handbilling locations are in enclosed malls. Sears occupies Oakland Mall along with three other major department stores, 140 specialty shops, and common areas with trees, plants, and benches. Sears is the largest store in the mall. There is one entrance to Sears from inside the mall, and eight entrances with double or quadruple doors from the sidewalk surrounding Sears. Sears owns, provides security for, and pays taxes on its own building and surrounding sidewalks, the area adjacent to the mall entrance 12 feet into the mall, and the parking lot adjacent to the store. No-solicitation/no-distribution signs are posted to the nonmall entrances, and these rules have largely been enforced. Sixty-five percent of Sears customers enter the mall through two of the five car entrances, and the remaining customers use the three other entrances. A hard-surfaced public easement 15 to 20 feet wide and maintained by the city of Roseville, Michigan, surrounds the mall.

On August 2, 1988, Union Organizer Thomas Ziembovic and six laid-off Ryder employees distributed handbills at the mall entrance to Sears and at two of the exterior entrances. Sears Operations Manager Marshall Dyke requested that the handbillers leave the mall entrance and, when they moved to two parking lot entrances, that they leave those entrances as well. When the latter request was ignored, Dyke called the police. The police arrived and ordered the handbillers off Sears property. The police told the handbillers that they could handbill on the easement around the property, but that if they obstructed traffic or disobeyed police orders they would be arrested. Mall officials also denied Ziembovic's request for permission to handbill at the Sears entrance to the mall.

Macomb Mall, which is also enclosed, consists of a Sears store, 2 or 3 smaller department stores, and 90

specialty shops. Sears owns and controls the property from its mall entrance to the easements surrounding its parking lot. Twenty percent of the Sears shoppers use the mall entrance; 80 percent use exterior doors. There are also uniformly enforced non-solicitation/no-distribution signs.

On August 9, 1988, the Union distributed handbills at all three exterior entrances to Sears' Macomb Mall store as well as at the mall entrance to Sears. At the direction of a Sears supervisor, two handbillers at the customer service parking lot entrance were told that the police would be called. The handbillers left. Handbillers at other entrances refused to leave, however. When Sears called the police and the police told the handbillers that they would be arrested, the handbillers left. Union Business Representative Gregory Lowran asked the police where the Union could handbill and was directed to the public easement. The police told Lowran that, if the handbillers went off the easement and onto the street, they would be arrested for obstructing traffic.

The Union did not attempt to handbill at Oakland Mall at the public easement around the parking lots, the public easement portion of the medians in entrances off the main road adjacent to the mall parking lots, or the median strips and jughandles on either of the adjoining roads. Nor did the Union attempt to handbill at Macomb Mall from the public easement to which it had been directed by the police, or the median strips of the abutting roads.

My colleagues adopt the judge's finding that the Respondent's property interest must yield at both handbilling sites to accommodate the Union's right to communicate its message to the public. In my view, the judge's analysis is flawed. First, he ascribes undue weight to the Union's Section 7 rights. Second, he holds the General Counsel to a much too lax a standard in meeting

his burden of showing there were no reasonable alternative means of communicating the Union's message.

While the judge acknowledged that the Section 7 right exercised here is "not at the stronger end of the 'spectrum' of Section 7 rights," he erroneously compared the Union's interest both to "struck product" consumer handbilling, which, according to the Supreme Court's decision in *NLRB v. Fruit Packers Local 760 (Tree Fruits)*, 377 U.S. 58 (1964), is permissible under the Act, and to area standards handbilling, found worthy of protection against substantial impairment in *Jean Country*, 291 NLRB 11 (1988). Neither comparison is apposite. In *Tree Fruits*, the Supreme Court distinguished the consumer-directed publicity, which it there found to be protected when "employed only to persuade customers not to buy the struck product [where] the union's appeal is closely confined to the primary dispute," from "consumer picketing . . . employed to persuade customers not to trade at all with the secondary employer [where] the latter stops buying the struck product, not because of a falling demand, but in response to pressure designed to inflict injury on his business generally." 377 U.S. at 72. Here, as in the latter situation, the Union's handbills plainly urged customers to stop shopping at Sears' stores. The Union thus "create[d] a separate dispute with the secondary employer." Id. Nor is the Union's activity strictly analogous to picketing in *Jean Country*, where the Union's immediate goal was to persuade potential customers not to patronize the primary employer, the nonunion store it was picketing.

The Union's dispute is with Ryder DPD, which laid off its employees after its contract with Sears for delivery services had been canceled. Because the handbilling is directed not at Ryder, but at a secondary employer, Sears, its status on the spectrum of Section 7 rights is weak.

It is conduct that is lawful only because its medium is handbilling rather than picketing.[2]

The secondary nature of the Union's conduct has significance also in evaluating the extent to which the General Counsel has met his burden of proving that the Union lacked reasonable alternative means of communicating with the public. A union is held to a higher standard before we may compel its entry onto the property of a secondary employer.[3] Here, the judge grounded his finding that the Union lacked adequate alternatives on (1) the speed of traffic on the roads surrounding the malls and the lack of traffic lights at some entrances; (2) difficulties in reaching drivers with handbills where handbillers were necessarily stationed on the passenger side of vehicles, and drivers would be unable to accept literature even if the cars could come to a complete stop and had car windows open; (3) the handbillers' risk of arrest for obstructing traffic by standing in median strips or jughandles at parking lot entrances; (4) the handbillers' inability to distinguish Sears shoppers from others entering the malls; and (5) the risk of enmeshment of neutral employers also located in the malls.

I am not persuaded that these obstacles so impeded the Union's ability to deliver its message that they justify compelling Sears to relinquish its property rights. First, the speed limits on the highways surrounding the malls

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[2] See *Edward J. Debartolo Corp. v. Florida Building Trades Council*, 485 U.S. 568 (1988).

[3] Thus, when a union has both a primary and secondary target at numerous locations, the Board examines whether the union can effectively communicate its protest against the *primary* employer before demanding access to establishments having a more remote connection to the primary dispute. See, e.g., *Hardee's Food Systems*, 294 NLRB 642, 643-644 (1989); *Federated Department Stores*, 294 NLRB 650, 652 (1989). In this case, try as my colleagues may to cast Sears as the "fulcrum" of this dispute, Ryder is, as they acknowledge, the primary, and Sears is plainly a secondary employer.

are no greater than those in effect at other businesses where the Board has found forced access to property unwarranted.[4] Second, the General Counsel offered no evidence that drivers without passengers were so prevalent at the parking lot entrances to the malls that it was impractical for the Union to try to deliver handbills to cars through the passenger windows. In the absence of that evidence, it has not been established that passengers, who are less prone to distraction than drivers entering the malls, do not offer the Union the necessary "reasonable" opportunity to convey its message from the perimeter of the malls.

Especially in view of the weak Section 7 interest at issue in this case, I am not persuaded that the Union has not had a reasonable opportunity to communicate with its audience. Perhaps some of the factors enumerated by the judge would have contributed to a less-than-100-percent acceptance rate among customers of Sears entering the mall parking lots by car. Even Board access orders, however, do not guarantee that any percentage of the public will accept handbills. They provide only for a reasonable opportunity to get the Union's message across.[5] In *Greyhound Lines,* 284 NLRB 1138 (1987), for example, a union was lawfully denied access to the interior of a bus terminal to picket and handbill customers of a restaurant enclosed within the terminal, where the vast number—but not all—of the restaurant patrons were off-the-street customers who could be reached from outside the terminal.[6]

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[4] See, e.g., *Providence Hospital,* 285 NLRB 320 (1987) (45 m.p.h.); *Homart Development Corp.,* 286 NLRB 714 (1987) (40 m.p.h.); *Skaggs Co.,* 285 NLRB 360 (1987) (35 m.p.h.).

[5] *Lechmere, Inc. v. NLRB,* 914 F.2d 313 (6th Cir. 1990) (Judge Torruella dissenting).

[6] See also *L & L Shop Rite,* 285 NLRB 1036, 1039 (1987), in which the Board noted that "[a]lthough only between 5 percent and 25 percent of the motorists entering paused to accept handbills, at

Further, it is not known on this record what measure of success the Union might have had if it had attempted to handbill at driveway entrances. The law may not require a union to attempt unreasonable alternative means of communication, but perimeter handbilling is certainly among "[t]he usual methods of imparting" the type of information the union seeks to convey to the public.[7] It has been established, for example, in a shopping center situation, that a driveway entrance heavily congested with traffic might create some degree of traffic backup, but not so great as to cause the police to intervene to ensure public safety.[8]

Here, the Union has not made a record of tried-and-failed attempts at handbilling the entrances to the two malls to meet its alternative-means burden under *Babcock & Wilcox*. Thus, it has failed to justify its claim to access to the Respondent's private property.[9] Without such a record, and in view of the weak nature of the Union's Section 7 interest, I cannot join my colleagues in compelling access to the Respondent's private property.

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least those desiring to receive the handbills had a reasonable opportunity to do so."

[7] *Babcock & Wilcox*, 351 U.S. at 113.

[8] *See L & L Shop Rite*, supra at 1039.

[9] See *Farah Mfg. Corp.*, 187 NLRB 601, 617 (1970), enfd. 450 F.2d 942 (5th Cir. 1971) ("One would think that the best way to determine the efficacy of such an effort [at alternative means of communication] would be to make it.").

APPENDIX D

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 4-CA-18791

LESLIE HOMES INC. and METROPOLITAN DISTRICT COUNCIL OF PHILADELPHIA & VICINITY, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, INC.

January 25, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS, BROWNING, COHEN, AND TRUESDALE

This is the first occasion for us to consider how the Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 117 L.Ed. 2d 79 (1992), affects an employer's right to bar nonemployee union representatives from engaging in "area standards" handbilling on the employer's private property. The narrow issue before us is whether the Respondent violated the Act by refusing to permit representatives of the Union to distribute leaflets to potential home buyers on the Respondent's premises. For the reasons discussed in part II, D below, we find that the Respondent did not violate the Act as alleged.

Procedural Background

On a charge filed by the Union on April 2, 1990, the General Counsel of the National Labor Relations Board

by the Regional Director for Region 4 issued a complaint and notice of hearing on September 27, 1990. The complaint alleged that the Respondent violated Section 8(a)(1) when it interfered with the distribution by union representatives of union literature to prospective purchasers of residential condominiums built by the Respondent at the site known as Crestwood Condominiums. On October 11, 1990, the Respondent filed an answer admitting in part and denying in part the allegations of the complaint, and denying that it had violated the Act.

On February 25, 1991, the General Counsel, the Respondent, and the Union filed with the Board a stipulation of facts. The parties agreed that the charge, affidavit of service of the charge, complaint and notice of hearing, the Respondent's answer, the order postponing a hearing indefinitely, and the stipulation of facts with attached exhibits constitute the entire record in this case. The parties further stipulated that they waived a hearing and the making of findings of fact and conclusions of law and the issuance of a decision by an administrative law judge.

On June 6, 1991, the Board issued an order approving the stipulation of facts and transferring the proceeding to the Board. The General Counsel and the Respondent filed briefs. The Union joined the brief of the General Counsel.

On February 24, 1992, the General Counsel filed a motion to dismiss the complaint, asserting that the Supreme Court's January 27, 1992 decision in *Lechmere* precluded further prosecution of the complaint. On March 9, 1992, the Charging Party filed a response to the motion to dismiss. On April 17, 1992, the Board issued a notice inviting the parties to submit supplemental briefs concerning the impact of *Lechmere* on this case. The General Counsel and the Charging Party filed supplemental briefs.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Pennsylvania corporation engaged in the building and developing of residential real estate with its principal place of business in Holland, Pennsylvania. During the 12-month period preceding the execution of the parties' stipulation of facts, the Respondent derived gross revenues in excess of $500,000 and purchased and received materials and supplies valued in excess of $50,000 directly from points located outside the Commonwealth of Pennsylvania. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

We further find that the Union, Metropolitan District Council of Philadelphia and Vicinity, United Brotherhood of Carpenters and Joiners of America, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Facts*

The parties stipulated to the following background facts. The Crestwood project (Crestwood) is a development containing 288 residential condominium units. Construction began on the project in December 1988 and was expected to be completed in June 1991. At the time the stipulation was signed, approximately 200 of the 288 anticipated units had been completed and 180 were occupied. There are no commercial enterprises on or near the project.

Condominium owners own their own individual units. A condominium association composed of condominium owners and the Respondent owns the developed common space. The Respondent owns the controlling interest in the association. The Respondent also owns the undeveloped common space.

The evidence before us consists of a written stipulation of facts, a videotape made by the Union of several of the key sites, and an engineering blueprint (declaration plan) of the development. The physical layout of the project and its suroundings is described and illustrated in these items. The entire project sits on the north side of Oxford Valley Road, a two-lane thoroughfare (one lane in each direction) with a speed limit at that location of 45 miles per hour. Vehicles may enter and exit Crestwood only two ways, by Leslie Drive or Norwalk Drive. These two streets, privately owned by the condominium association, intersect only with each other inside the project, and with Oxford Valley Road at the entrances to the project.

Leslie Drive is the main entrance to Crestwood. A landscaped traffic island at this entrance separates the one lane entering Crestwood from two exit lanes, one for vehicles turning right onto Oxford Valley Road, and one for those exiting to the left. There is a stop sign at the Leslie Drive exit onto Oxford Valley Road. Vehicles turning right into the project may pull first onto a 9-foot wide shoulder of Oxford Valley Road before turning onto Leslie or Norwalk. The Norwalk Drive entrance from Oxford Valley Road is approximately 500 feet from the Leslie Drive entrance. Like Leslie Drive, Norwalk Drive's entering and exiting lanes are divided by a traffic island, although Norwalk has only one exit lane. Whereas the traffic island in Leslie Drive is entirely on Crestwood property, a small portion of the Norwalk Drive island extends beyond the property line.[1]

A public sidewalk 4 feet wide runs the entire length of the Crestwood property along Oxford Valley Road. The inner edge of the sidewalk and the Crestwood property line are separated by a grassy area 3 feet wide. Between the

[1] The declaration plan indicates that part of the Leslie Drive island may be outside the property line; however, the parties stipulated that the island is entirely on the Respondent's property.

sidewalk and Oxford Valley Road is a public grassy verge, also 3 feet wide. Prior to the incidents giving rise to these charges, the project was posted with a no-trespassing sign, but its location and contents are not part of the record. The no-trespassing policy had been enforced prior to the date of the stipulation; most instances of enforcement involved adolescents. The Respondent contracts with a security company to provide security in the evenings.

At the time the stipulation was executed, a model condominium, located on Leslie Drive, 225 feet inside the entrance, was open for inspection by potential customers 7 days a week from 10 a.m. to 6 p.m. Approximately 12 to 35 persons visited the model home on Sundays, the busiest day. A substantial majority of potential buyers enter the development by vehicle, while a relatively small percentage enter on foot.

When construction commenced, union carpenters employed by Samuel Kaufman, Inc., worked on the first 50 units. In December 1989, however, the Respondent began to employ carpenters directly. The Respondent has not paid these carpenters prevailing union wages or benefits.

On April 1, 1990, the Union attempted to distribute handbills in front of the model condominium open to the public for inspection. The handbills communicated, among other messages, a complaint that the Respondent was paying some workers on the project below the area standards for such labor. The handbill stated:

> This is an appeal to the general public. Leslie Homes, Inc. employs foreign/immigrant workers at Crestwood, who are paid substantially less than the prevailing wage and benefit standards in the area. Leslie Homes, Inc. is destroying the fair wages and living standards of area tradesmen who return their earnings to the local economy by purchasing goods, services and housing, and by paying local and federal taxes.

The document then questioned the quality of the homes at Crestwood and ended with the exhortation, "Exercise caution before signing an agreement of sale. Protect the American dream—don't buy at Crestwood." The number of handbillers is not in the record. The handbillers were peaceful. At times, they were within 5 to 10 feet of the door of the model.

At some point during that day, the Respondent told the handbillers that they were on private property and directed them to leave. The handbillers refused to do so. An agent of the Respondent then called the police, who at first declined to take action against the handbillers. After the Respondent's president contacted the district attorney's office, however, the police advised the union representatives that they were subject to removal and arrest if they did not leave the premises. The police then allowed the union representatives to leaflet on the shoulder of Oxford Valley Road.

After April 1, the Union twice attempted from the shoulder of Oxford Valley Road to leaflet vehicles as they entered the project. On both occasions, traffic was slowed on Oxford Valley Road. The Union has never picketed at Crestwood.

B. *Issue*

The issue is whether the Respondent violated Section 8(a)(1) of the Act by refusing to permit the union representatives to engage in handbilling of potential home buyers on the Respondent's property and by calling the police to have the handbillers removed from the property.

C. *Contentions of the Parties*

Before the Supreme Court issued its decision in *Lechmere*, the General Counsel and the Union contended that, under the method of analysis set forth in *Jean Country*, 291 NLRB 11 (1988), the union representatives should

have been afforded acces to the Respondent's property for the purpose of handbilling. The Respondent argued that, under a proper reading of *Jean Country*, it was not required to allow the union representatives on its property.

Since *Lechmere* issued, the General Counsel has taken the position that, under the Supreme Court's analysis in that case, the Union was not entitled to access to the Respondent's property. The Union contends that, because *Lechmere* was concerned with union access to an employer's property for organizing purposes, the Supreme Court's decision does not apply to this case, which involves "area standards" handbilling of consumers rather than organizational activity. Accordingly, the Union argues that the Board should apply the *Jean Country* analysis, under which, in the Union's view, the Respondent violated the Act as alleged.[2]

D. *Discussion*

The problem presented by this case is a familiar one. The union representatives attempted to engage in peaceful "area standards" handbilling, an activity that is protected by Section 7 of the Act.[3] The Respondent, by virtue of its controlling interest in the condominium association that owns the developed common portions of Crestwood and its sole ownership of the undeveloped common areas, as well as the street contiguous to the model home, has a legitimate private property interest in the Crestwood development.[4] The issue was joined when the Union attempted

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[2] The Respondent did not file a supplemental brief on the applicability of *Lechmere* to this case.

[3] See *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 206 fn. 42 (1978); *Red Food Stores*, 296 NLRB 450, 452 (1989).

[4] There is no contention that the Respondent lacked a property interest in the Crestwood development, or that the handbillers were employees of the Respondent (and thus were not trespassers). Had either of those conditions existed, this would be a different

to assert the Section 7 right in contravention of the Respondent's right to prevent strangers from trespassing on its property.

The seminal authority in this area is the Supreme Court's decision in *Babcock & Wilcox*.[5] The issue in *Babcock & Wilcox* was whether, and under what circumstances, an employer is required to allow nonemployee union representatives access to the employer's property for the purpose of organizing his employees. The Court held that:

> [A]n employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.[6] . . . Organiza-

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case. See, e.g., *Barkus Bakery*, 282 NLRB 351 (1986), enfd. mem. 833 F.2d 306 (3d Cir. 1987) (employer's attempt to eject union organizers from property not its own violated Sec. 8(a)(1)); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956) (distinguishing between organizational rights of employees and of nonemployee union organizers).

[5] See fn. 4, supra.

[6] There is no evidence that the Respondent's no-access policy was enforced against the Union but not against other solicitors. The General Counsel (and, derivatively, the Union) originally argued that the enforcement of the Respondent's no-trespassing policy chiefly against adolescents, combined with its erection of the more prominent no-trespassing sign only after the April 1 handbilling episode, "suggests that Respondent did not exclude other solicitors prior to that date and that restriction to public access was limited." We decline to draw the inference "suggested," which does not follow from the facts. In any event, neither the General Counsel nor the Union explicitly maintained that the Respondent discriminated against the Union by allowing others to engage in similar distributions. Indeed, had this been the General Counsel's theory of the case, we presume that he would not have moved to dismiss the complaint, since the Court's holding in *Lechmere* did not purport to de-

> tion rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. . . . [W]hen the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize. . . . [I]f the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property. [351 U.S. at 112-113.]

Although the Section 7 activity involved in *Babcock & Wilcox* was organizational, the Court in later cases indicated that the "accommodation" analysis in Babcock should be applied in other contexts as well. See *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976) (lawful economic strike activity); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, supra, 436 U.S. at 207 (area standards picketing). In *Hudgens*, the Court stated that:

> The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective Section 7 rights and private property rights asserted in any given context. In each generic situation, the pri-

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tract from its earlier statement in *Babcock* that "an employer may validly post his property . . . if he does not discriminate against the union by allowing other distribution." See *Davis Supermarkets*, 306 NLRB 426 (1992), enfd. on other grounds 2 F.3d 1162 (D.C. Cir. 1993). In short, there is no serious contention, and no evidence, that the Respondent engaged in disparate treatment of the union representatives.

> mary responsibility for making this accommodation must rest with the Board in the first instance. [424 U.S. at 522; citations omitted.] [7]

In *Jean Country*, the Board set forth an analytical framework to be used in determining the accommodation to be made in all access cases. The Board announced that in each case it would consider the strength of the employer's property right, the centrality of the Section 7 right, and the availability of reasonable alternative means for the dissemination of the union's message:

> [I]n all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process. [291 NLRB at 14.]

In formulating its *Jean Country* analysis, the Board adverted to the Supreme Court's statement in *Hudgens*, quoted above, to the effect that "there is a 'spectrum' of Section 7 rights and private property rights and that the place of a particular right in that spectrum might affect the outcome of a case." Id. at 13. Thus, the Board announced that when the employer has particularly compelling reasons for denying access and the Section 7 right asserted is less central than the right of employees to organize or protest unfair labor practices, "we may more readily find that [nontrespassory] means of communication . . . constitute a reasonable alternative." Id.

The Supreme Court in *Lechmere* rejected the Board's *Jean Country* approach. The Court's majority found that

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[7] In *Hudgens*, the Sec. 7 activity was picketing in support of an economic strike by employees of one of the tenants of a shopping mall (albeit employees at the employer's warehouse at a different location, not of its store at the mall).

the Board, in relying on the quoted language in *Hudgens*, had misconstrued *Babcock & Wilcox*. According to the Court, *Babcock* stands for the proposition that "Where reasonable alternative means of access exist, Section 7's guarantees do not authorize trespasses by nonemployee organizers, *even* (as we noted in *Babcock* . . .) 'under . . . reasonable regulations' established by the Board." 117 L.Ed. 2d at 91. Thus, the Court said that *Hudgens*, "did not purport to modify *Babcock*, much less to alter it fundamentally in the way *Jean Country* suggests." Id. The Court then stated:

> To say that our cases require accommodation between employees' and employers' rights is a true but incomplete statement, for the cases also go far in establishing the *locus* of that accommodation where nonemployee organizing is at issue. *So long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place.* [Emphasis added.] It is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights as described in the *Hudgens* dictum. [Id. at 91-92.]

The Court found that *Jean Country* impermissibly recast, as a "multifactor balancing test," the general rule set out in *Babcock* that "an employer may validly post his property against nonemployee distribution of union literature." Id. at 92, quoting *Babcock & Wilcox*, 351 U.S. at 112.

Thus, the Court explained, the threshold inquiry in *Lechmere* was whether *Babcock*'s inaccessibility exception could properly be applied in that case. Contrary to the Board, the Court found that the exception was not applicable. It emphasized that

> the exception to *Babcock*'s rule is a narrow one. It does not apply wherever nontrespassory access to employees may be cumbersome or less-than-ideally

> effective, but only where "the *location of a plant and the living quarters of the employees* place the employees *beyond the reach* of reasonable union efforts to communicate with them. [117 L.Ed 2d at 92; emphasis in the original; quoting *Babcock & Wilcox*, 351 U.S. at 113.]

The *Babcock* exception, said the Court, was designed to safeguard the rights of "those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society," such as employees in mining camps, logging camps, or mountain resort hotels. Id. (Citations omitted.) The union's burden of establishing such isolation is a heavy one,[8] the Court continued, and cannot be satisfied "by mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication." Id. at 92-93.

Turning to the facts of the case before it, the Court in *Lechmere* found that the union had failed to carry its burden. First, the Court held that because the employees who were the focus of the union's organizing efforts did not live on Lechmere's property, they were presumptively not beyond the reach of the union's message. Id. at 93. Nor had the union rebutted that presumption. The employees' accessibility, the Court found, was indicated by the union's having contacted a substantial percentage of them directly, through mailings, telephone calls, and home visits. Such direct contacts, however, were not the only, or even a necessary, means of communication; "signs or advertising also may suffice." Declining to pass on the Board's finding that advertising in local newspapers (which the union had tried) was not reasonably

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[8] The Court quoted the following language from *Sears, Roebuck & Co.*, supra, 436 U.S. at 205: "That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity." 117 L.Ed. 2d at 89-90.

effective because it was expensive and might not reach the employees, the Court found that other means of communication were "readily available." Thus, the union could have placed signs on the public property abutting *Lechmere*'s parking lot to apprise the employees of the organizing campaign. In fact, the union had picketed the entrance to the parking lot for months as employees were arriving at and leaving work. In summary, the Court found that *access* to employees, rather than success in winning them over, is the critical issue,[9] and because the union had failed to identify any "unique obstacles" frustrating access to the employees,[10] the employer had not acted unlawfully in barring the union organizers from its property. Ibid.

In *Lechmere*, as we have noted, the Section 7 activity engaged in by the union representatives was organizational. In this case, the Section 7 activity is area standards handbilling. We turn now to a consideration of the effect of *Lechmere* in the present context. At least three issues have been suggested: (1) whether *Lechmere* applies at all outside the organizing sphere, (2) whether, after *Lechmere*, the *Babcock* exception for inaccessible employees may be invoked when the target of the union's message is the employer's customers instead of its employees, and (3) assuming the applicability of the *Babcock* exception, whether the Union here carried its "heavy burden" of showing that it faced "unique obstacles" that so frustrated its attempts to reach the customers that it should have been allowed to handbill on the Respondent's premises.

1. Does *Lechmere* apply to area standards activities?

The Union and our dissenting colleagues contend that *Lechmere* does not apply in the area standards context.

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[9] The Court recognized, however, that success (or the lack of it) may be relevant in determining whether reasonable access exists. 117 L.Ed. 2d at 92.

[10] See *Sears, Roebuck & Co.*, 436 U.S. at 205 fn. 41.

They reason that Section 7 protects not only employees' organizational efforts, but also their right "to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection," such as the handbilling in this case. The Court in *Lechmere* held that "the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers," 117 L.Ed. 2d at 87, and reiterated the distinction made in *Babcock* "between the organizing activities of employees [to whom Section 7 guarantees the right of self-organization] and nonemployees [to whom Section 7 applies only derivatively]." Id. at 88. The Union and the dissent, however, argue that the Court's rationale applies only in the organizational context, because only in that setting do union representatives who are not employed by the targeted employer possess only "derivative" Section 7 rights. They contend that the handbillers in this case were exercising their own (nonderivative) Section 7 rights, and also represented the Union's members who, though not employees of the Respondent, have exercised their Section 7 right to join a labor organization and to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection." According to the dissent, "*Lechmere's* reasoning, which limited itself to the self-organizing guarantee of Section 7, does not address their activities." See *Loehmann's Plaza II*, 316 NLRB No. 24, slip op. at 8 (Members Browning and Truesdale, dissenting).

We find no merit to this argument. In the first place, given the Court's concern in *Lechmere* with protecting employers' private property rights,[11] we can discern no rea-

[11] The dissent asserts that the Court in *Lechmere* was concerned only peripherally with private property rights. See *Loehmann's Plaza II*, slip op. at 12 (Members Browning and Truesdale, dissenting). While it is true that we are construing the rights of employees under Sec. 7 of the Act, the issue before us in these

son to assume that it would apply its reasoning only in organizing cases. It is true, as the Union and the dissent observe, that the Court in *Lechmere* addressed only the right of nonemployees to organize on an employer's property, and did not discuss nonemployee access for other purposes. We find no suggestion in the Court's opinion, however, that it focused on organizing activities for any reason other than that *Lechmere* was an organizing case, and that the Court was simply (and prudently) deciding the case before it. Moreover, given the Court's previous

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cases is whether the employers violated the Act by preventing individuals who were not their employees from exercising their Sec. 7 rights *on the employers' property*. As the Supreme Court put it in *Sears*, "The remaining question is whether under *Babcock* the trespassory nature of the [area standards] picketing caused it to forfeit its protected status." 436 U.S. at 204-205. Indeed, our colleagues themselves would apply an access test in cases like these which "would, in every case, factor in the nature and strength of the employer's property interest versus the importance of the Sec. 7 right asserted by the union." *Loehmann's Plaza II*, slip op. at 13 (Members Browning and Truesdale, dissenting). They thus tacitly admit that the construction of employers' property rights is a critical consideration in these cases because under *Babcock*, the Board is required to make an accommodation between Sec. 7 rights and property rights when private property is the targeted locus of the Sec. 7 activity and persons deemed "nonemployees" by the Court are seeking access.

Our colleagues concede that "[t]he Court in *Lechmere* did express some concern for private property rights[.]" Id. at 12. In our view, they understate the case. The Court in *Lechmere* repeatedly indicated concern for employers' property rights, by stressing the limited circumstances in which these rights may be infringed by nonemployee union organizers. See 117 L.Ed. 2d at 88: "As a rule, then, an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property"; id. at 89 (quoting *Sears* with approval): "While *Babcock* indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule"; and id. at 92: "We reaffirm . . . today . . . *Babcock*'s general rule that 'an employer may validly post his property against nonemployee distribution of union literature' (quoting 351 U.S. at 112)."

indications that the *Babcock* "accommodation" principle applies in nonorganizational settings,[12] we would not expect the Court to limit sharply that principle to organizing cases without some overt signal to that effect. We find no such signal in *Lechmere*. To the contrary, the Court quoted (and reaffirmed) "Babcock's general rule" that "an employer may validly post his property against nonemployee distribution of union literature," 117 L.Ed. 2d at 92. The Court omitted the arguably qualifying language in *Babcock* "if reasonable efforts by the union through other available channels of communication will enable it to reach *the employees* with its message[.]" 351 U.S. at 112 (emphasis added).[13] By phrasing the "general rule" against

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[12] See p. 3, supra. In this regard, the Court in *Sears* observed that "Even on the assumption that picketing to enforce area standards is entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation, it would be unprotected in most instances," 436 U.S. at 206 (fn. omitted), thus suggesting strongly that the accommodation analysis in *Babcock* (and reaffirmed in *Lechmere*) is applicable to area standards cases such as these.

The dissent suggests that we have inappropriately ignored what it characterizes as *Hudgens*' recasting of the *Babcock* test as applied in the nonorganizational context. *Loehmann's Plaza II, supra*, slip op. at 12 (Members Browning and Truesdale, dissenting). We find no basis for the proposition that *Hudgens*, at least as construed in *Lechmere*, recast the *Babcock* test. In both cases, the Court emphasized the need to seek to accommodate Sec. 7 rights and property rights. In *Babcock*, the Court struck the balance markedly in favor of property rights in circumstances where nonemployee union agents were engaged in the Sec. 7 activity. In *Hudgens*, the Court suggested that a different balance might be struck in circumstances where, inter alia, the Sec. 7 activity was being conducted by employees of an employer at the shopping center (albeit they were employed elsewhere). We fail to see how *Hudgens* gives any support to the Union in this case where, like *Babcock* and unlike *Hudgens*, the activity is conducted by nonemployee union agents.

[13] Member Cohen notes that the Court's language set forth above may indeed suggest that trespassory activity which is not aimed at employees is simply barred without exceptions, i.e., it is not

trespassory activity without reference to the language arguably limiting it to attempts to reach employees, the Court, if anything, was signalling that *Babcock* should continue to be applied outside the organizing context.[14]

The argument advanced by our colleagues and the Union is unsound for another reason. The dissenters urge that nonorganizational activities, such as area standards picketing and handbilling, are protected not by the Section 7 right of self-organization but by "Section 7's guarantee of a right not treated in *Lechmere*—the right of employees 'to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.' " *Loehmann's Plaza II*, slip op. at 8 (Members Browning and Truesdale, dissenting). As the latter right is not derivative of the rights of the Respondent's employees, our colleagues contend, it is not reached by the Court's reasoning in *Lechmere*; accordingly, under their theory, the Board is free to require access under the "other concerted activities" rubric in nonorganizational cases, even after *Lechmere*.

The obvious problem with that position is that it would seem to have been equally applicable in the organizational setting, where the organizing could be seen as benefitting already organized employees against nonunion competition. Yet the argument can be made that it was implicitly rejected in *Lechmere*. As our colleagues point out, the

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subject to the qualifying language of *Babcock*. See infra at fn. 18 for a full discussion of Member Cohen's position.

[14] The Union's argument that if *Lechmere* is applied to cases involving nonorganizational activities, employees will be deprived of the right to "elect or otherwise delegate persons to conduct collective bargaining and other activities on their behalf" is plainly without merit. *Lechmere* does not limit the scope of activities protected by Sec. 7; it only discusses the circumstances in which an employer may bar union representatives who are not his employees from carrying out their activities on the empolyer's private property.

Court in *Lechmere* did not discuss the possibility that the organizers' activities could be protected under the "other concerted activities for the purpose of . . . other mutual aid or protection" language of Section 7, yet it found that nonemployee organizers have only derivative Section 7 rights.[15] Thus, it is at least arguable to read the Court's decision as indicating that the organizers would have fared no better under the "other concerted activities" theory propounded by the dissent. Under that interpretation of *Lechmere*, trespassory nonorganizing activity would *never* be protected because, as our colleagues rightly point out, the Respondent's customers whom the nonemployees are attempting to reach with their area standards message have no Section 7 rights corresponding to the employees' right of self-organization, and thus the nonemployees would not even have the limited derivative rights possessed by nonemployees in the organizing setting.[16]

As our colleagues point out, the foregoing reading of *Lechmere* is not the only possible one. But even if their alternative rights theory is cognizable after *Lechmere*, our colleagues fail to explain why the *Babcock* analysis, as explicated in *Lechmere*, should favor access *more* for nonemployees engaged in nonorganizational "other concerted activities" than for nonemployee organizers. That failure is perhaps understandable in light of *Sears*' suggestion that nonemployee area standards activities are *less* favored

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[15] For that matter, it is arguable that the organizers in *Lechmere* were exercising their (own) Sec. 7 right "to . . . assist labor organizations" in attempting to organize the unorganized, but the Court's decision can be read as implicitly rejecting that theory as well.

[16] This appears to be the Ninth Circuit's reasoning in *John Ascuaga's Nugget, Inc. v. NLRB*, 968 F.2d 991 (1992) (construing *Lechmere* as affording access rights only to nonemployee organizers who are trying to contact an employer's employees, not to nonemployees attempting to communicate with the employer's customers). As we explain below, we find it unnecessary to decide that issue in this case.

under the *Babcock* analysis than nonemployee organizational efforts. 436 U.S. at 206 and fn. 42.

Our colleagues assert that "*Sears*' access discussion cannot be regarded as conclusive" because access was involved only tangentially in a preemption case. *Loehmann's Plaza II*, slip op. at 12 (Members Browning and Truesdale, dissenting). The latter assertion is somewhat startling, given *Lechmere's* flat statement that "If there was any question whether *Central Hardware* [17] and *Hudgens* changed Section 7 law, it should have been laid to rest by *Sears*[.]" 117 L.Ed. 2d at 89.

2. Is the *Babcock* exception applicable to area standards activities?

The Ninth Circuit has construed the Supreme Court's decision in *Lechmere* to mean that the *Babcock* exception, providing for access by union organizers to isolated employees, does not apply to union representatives who are attempting to contact, instead of an employer's employees, an employer's customers. *John Ascuaga's Nugget v. NLRB*, supra. This is a question we need not and do not decide today because, as we discuss below, we find that, under *Lechmere*, the Union did not demonstrate that the Respondent's customers were so isolated that the handbillers should have been permitted to approach them on the Respondent's premises.[18]

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[17] *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972).

[18] For the purposes of deciding this case, Member Cohen agrees that *Lechmere's* strict test for organizational activity applies to area standards activity as well. However, he wishes to express his view that the test for area standards activity may well be even more strict than that for organizational activity. In this regard, Member Cohen notes the Supreme Court's observation that area standards activity may be entitled to lesser protection than organizational activity. The latter is at the very core of Sec. 7; the former, while protected, does not lie at the core of Sec. 7. See *Sears* at fn. 42. Further, organizational activity is aimed at the

3. Did the Union have reasonable alternative means of contacting the Respondent's customers?

We assume, without deciding, that *Lechmere* permits a union to show that an employer's customers are not reasonably accessible by nontrespassory methods, and that union representatives therefore may be entitled to engage in area standards activities on the employer's property.[19] In *Lechmere*, however, the Supreme Court made it clear that, even in organizing cases, *Babcock*'s inaccessibility exception applies only in unusual circumstances. As we noted above,

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employees of the employer-property owner. Area standards activity is on behalf of employees elsewhere. It therefore lacks a "vital link" to the employees on the property. Id.

Because of these considerations, the Supreme Court has asserted its serious doubt as to whether trespassory area standards activity is entitled to the limited protection afforded to trespassory organizational activity. Further, the Ninth Circuit has suggested that the *Lechmere/Babcock* exception does not apply to trespassory activity aimed at the public rather than at employees. *John Ascuaga's Nugget*, supra.

Because the Union's activity in this case did not fall within the *Lechmere/Babcock* exception, Member Cohen does not resolve the issues discussed above. However, he believes that there is substantial support for the argument that the exception should not be applied to trespassory area standards activity.

Finally, Member Cohen notes that the dissenters rely on the distinction between the organizational activity in *Lechmere* and the area standards activity herein. Based on the considerations set forth above, Member Cohen suggests that the distinction cuts with greater force against the position of the dissenters than it does in their favor.

[19] The Court in *Lechmere* held that, in the organizing context, if employees are shown to be inaccessible, the accommodation analysis moves to a second level, at which the employees' Sec. 7 rights are balanced against the employer's property rights, as indicated in *Hudgens*. 117 L.Ed. 2d at 91-92. Consequently, even where union organizing is concerned, a showing of employee inaccessibility does not mean, ipso facto, that the employer's property rights must yield. We assume, without deciding, that the same is true in nonorganizing cases.

the Court stated that the *Babcock* exception applies only when, because of the location of a plant and the living quarters of the employees, the employees are beyond the reach of the union's reasonable attempts to communicate with them. 117 L.Ed. 2d at 92. The union has the heavy burden of establishing that the employees, because of the nature of their employment, are "isolated from the ordinary flow of information that characterizes our society." Id. Unless the Union can show that "unique obstacles" exist that frustrate access to the employees, the employer is entitled to bar the union from his property. Id. at 93. Employees who do not reside on the employer's property are presumptively not beyond the reach of the union's message. Id. We assume, for purposes of deciding this case, that the same principles apply when a union seeks access to an employer's property to communicate an area standards message to the employer's customers.

Applying the foregoing principles to the stipulated facts of this case, we find that the Union has not shown that the Respondent's customers are "isolated from the ordinary flow of information that characterizes our society," or that it lacks reasonable alternative means of contacting them.[20] We arrive at that finding for two reasons. First,

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[20] We agree with our dissenting colleagues that whether or not there are reasonable alternative means of contacting a union's intended audience depends in part on the nature of the audience. However, we reject their contention that this principle is a reason why *Lechmere* should not be extended to nonorganizational union activities. See *Loehmann's Plaza II*, slip op. at 10-11 (Members Browning and Truesdale, dissenting). *Lechmere* teaches that, where nonemployee organizers seek access to an employer's property to attempt to contact the employer's employees, access need not be afforded if the union has reasonable alternative means of contacting the employees. We find no reason in *Lechmere* for not applying that same analysis when the union is attempting to contact individuals who are not the employer's employees. In either case, the Board must determine whether, given the nature of the audience, reasonable alternative means exist for reaching it with

the Union has not shown that it could not have adequately conveyed its message to the Respondent's customers by picketing or placing stationary signs on the public property between Oxford Valley Road and the Crestwood development.[21] (The Union never attempted to picket on the public property, and it does not contend that the essential message contained on the handbills could not have been satisfactorily rendered on picket signs.)[22] As we have

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the union's message. The same means may be reasonable for some audiences but not for others.

Member Cohen does not join in those portions of the opinion infra which attempt to set forth the *existence of alternatives* available to the Union. In his view, it is sufficient, and more consistent with *Babcock* and *Lechmere*, to say only that the General Counsel has not met his burden of showing the *absence of alternatives* available to the Union.

[21] As the Union's actions were directed at the Respondent's own hiring practices and employment conditions, rather than those of another employer, the Respondent is not a neutral, but the "primary" employer. The Union thus would not risk being found to have violated Sec. 8(b)(4)(B) of the Act by picketing the Respondent instead of handbilling. See *NLRB v. Retail Clerks Local 1001 (Safeco)*, 447 U.S. 607, 609 and fn. 3 (1980).

[22] Our dissenting colleagues, however, contend that the Union's message was too detailed to be contained on a picket sign. We reject that contention (which, as we have noted, the Union does not raise on its own behalf). In *Red Food Stores*, supra, the Board found that a similar area standards message essentially was a request not to patronize, which was readily conveyed by pickets. 296 NLRB at 453. As the Union never picketed at the Crestwood property, it failed to demonstrate that its essential message could not be conveyed on a picket sign. Cf. *Loehmann's Plaza I*, 305 NLRB 663, 667 (1991), in which the union did picket and in which no exceptions were filed to the judge's finding that the area standards message on the union's handbills could not be contained on a picket sign. *Sentry Markets v. NLRB*, 914 F.2d 113 (7th Cir. 1990), cited by our colleagues, did not involve an area standards message and thus is inapposite to this case.

That the Union added to the complexity of its essential message by including a number of apparently speculative suggestions about

noted, the public property extends the entire width of the Respondent's property, and abuts Leslie Drive and Norwalk Drive—the only two routes an automobile can take into the developments. The public property is 10 feet wide, including a 4-foot wide sidewalk where pickets could safely patrol. In addition, although the speed limit on Oxford Valley Road is 45 miles per hour, it is apparent that cars turning into the development at either Leslie Drive or Norwalk Drive would have to slow down considerably to execute what is approximately a 90-degree turn into the Crestwood property at either point, and also (in the case of cars turning right into the development) normally would move onto the shoulder, nearer to any signs the Union might place on the public property. It appears, then, that either stationary signs or picket signs on the public property near the entrances to the property would be clearly visible to drivers slowing down to enter the Crestwood development. There is nothing in the stipulated record to suggest that picketing, or the placement of stationary signs, on the public property would have posed any safety hazard to either the union representatives or to passing motorists.

We further find that the Union failed to demonstrate that it could not have communicated its message to potential home buyers as they left the Crestwood property. We first observe that the condominiums sold on the Respondent's premises differ markedly, in the sheer size of the investment being contemplated, from groceries, blue jeans, and other nondurable items sold at retail. Experience thus supports the Respondent's common sense argument that potential home buyers are likely to engage in extensive comparison shopping before they make a pur-

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workmanship at Crestwood does not require a different result. Our colleagues cite no authority for the proposition that a union may gain access to an employer's property, when access otherwise would be denied, merely by complicating an essentially simple message to the point at which it can no longer be rendered on a picket sign.

chase. The respondents' potential buyers generally will not have already made their purchases at the time they leave the premises, and the Union therefore can effectively approach them as they leave, rather than only as they enter.[23]

In addition, the record establishes that union representatives stationed on public property outside the Leslie Drive entrance would have a clear, unobstructed view of the model home and the parking area in front of it. It would have been possible for those representatives to watch the parking area to identify the cars driven by individuals visiting the model home, and then to attempt to give them handbills as they left the development.[24] In this regard, it should be recalled that there is a stop sign at the Leslie Drive exit from the Crestwood property, the closest exit to the model home. It therefore would not have been necessary for union representatives wishing to handbill exiting customers to attempt to flag down moving cars or to station themselves in the middle of the intersection; they could have remained on the sidewalk or on the grassy areas next to Leslie Drive and ap-

[23] The dissent contends that exit handbilling would be ineffective because some customers may have bought condominiums on their first visit, and others may have returned after having visited Crestwood on a previous occasion when the Union had no representatives present. Whatever the factual merits of these arguments may be (and the second suggests that the Union should be rewarded with access for being less than vigorous in attempting to communicate its message), they fail to take into account the fact that the Union has not shown that it could not convey its message, by means of stationary signs or picket signs on public property, to customers as they *enter* the Crestwood development. In any event, *Lechmere* plainly establishes that a union may be found to have reasonable nontrespassory access to its intended audience even if it is not able to contact all, or even most, members of that audience.

[24] Consequently, it would not have been necessary to stop everyone leaving the Respondent's property, but only those who had been seen leaving the model home.

proached the cars as they stopped for the stop sign.[25] Nor would the use of this tactic have required the handbillers to run continuously back and forth between the public property and the customers' cars; the parties have stipulated that even on Sundays, usually the busiest day of the week, only 12 to 35 persons visit the model home, between 10 a.m. and 6 p.m.—an average of, at most, between 4 and 5 per hour. Under these circumstances, we find that approaching individuals who had visited the model home as they left the Crestwood property would have been a reasonable alternative to handbilling on the property itself.

For all the foregoing reasons, we find that reasonable alternative means were available to the Union for communicating its area standards message to potential customers of the Respondent, and, a fortiori, that it has failed to carry its burden of showing the absence of such means. We therefore find that the Respondent did not act unlawfuly by ordering the Union representatives to leave its private property and by calling the police to have them removed, and we shall dismiss the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Metropolitan District Council of Philadelphia & Vicinity, United Brotherhood of Carpenters and Joiners of America, Inc. is a labor organization within the meaning of Section 2(5) of the Act.

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[25] Of course, any picket signs or stationary signs placed near the exit also would be plainly visible to drivers who had stopped for the stop sign.

The dissent argues that motorists who stop for the stop sign are still on Crestwood property. Although it appears that the stop sign is located a few feet inside the property line, a motorist stopped at the stop sign would have to drive forward only those few feet to receive a handbill from an individual stationed on public property.

3. By ordering union representatives to leave and calling the police to have them removed from its property at Crestwood Condominiums, Bristol, Pennsylvania, the Respondent did not interfere with the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. January 25, 1995

James M. Stephens, Member

Charles I. Cohen, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

CHAIRMAN GOULD, concurring.

I join Members Stephens and Cohen in dismissing the complaint in this case and add the following additional comments.

The place of work is the one area where workers come together on a daily or regular basis and have an opportunity to share views and to discuss matters such as employment conditions and the question of whether they desire to be represented by a union through the collective-bargaining process, and to "learn from others the advantages of self-organization . . . ." Justice White dissenting in *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 851 (1992). The same holds true of the union's ability to communicate its message to the consuming public when the latter is present on private property to which the public has access.[1]

As Justice Frankfurter noted in a concurring opinion, title to property does not properly control this issue. *Marsh v. Alabama*, 326 U.S. 501, 511 (1946). This view, expressed within the context of constitutional litigation, has always seemed to me to be relevant to the issues relating to the competing interests of the right to organize, to learn from others, and to communicate to the public, on the one hand, along with the employer's

---

[1] Although the Court stated that "the constitutional guarantee of free expression has no part to play" in resolving conflicts between Sec. 7 rights and private property rights under the Act (*Hudgens v. NLRB*, 424 U.S. 507, 521 (1976)), this does not mean that it is inappropriate for the Board to consider constitutional principles, particularly those inherent in the First Amendment, when devising a statutory standard for access issues. Cf. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). (In balancing employer and employee rights in a union organizational campaign, the Board must "take into account" the fact that "an employer's [First Amendment] free speech right to communicate his views to his employees," as embodied in Sec. 8(c) of the Act, "cannot outweigh the equal [First Amendment] rights of the employees to associate freely, as those rights are embodied in § 7 . . . .")

legitimate interest in its property. Gould, *The Question of Union Activity on Company Property*, 18 Vand. L. Rev. 73 (1964); Gould, *Union Organizational Rights and the Concept of "Quasi Public" Property*, 49 Minn. L. Rev. 506 (1965). Cf. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 Harv. L. Rev. 1394 (1971).

Regrettably, however, the majority opinion of the Supreme Court in *Lechmere* resolves the issue definitively. I am, of course, bound by the Supreme Court's view of this matter and, like the majority, I am of the view that *Lechmere* creates no distinction and sends no "signal" that union efforts to reach customers and the public ought to be treated differently from the initiatives undertaken in *Lechmere* itself. Under the circumstances of this case, the reasoning employed in *Lechmere* applies, and, therefore, I am required to join and concur in the majority opinion. If there is to be a different result, it must come from the President and the Congress and not the Board.

Dated, Washington, D.C. January 25, 1995

William B. Gould IV, Chairman

NATIONAL LABOR RELATIONS BOARD

MEMBERS BROWNING AND TRUESDALE, dissenting.

Contrary to our colleagues, we would find that the Respondent violated Section 8(a)(1) of the Act by interfering with the Union's peaceful distribution of handbills in front of the Respondent's model home advising potential purchasers that the Respondent did not pay the carpenters it employed prevailing wages and benefits. In dismissing the complaint, our colleagues erroneously extend *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992), to nonorganizational activity, such as the area standards handbilling involved in the instant case. In our joint dissent in *Loehmann's Plaza II*, 316 NLRB No. 24 (Jan. 25, 1995), issued today, we discussed in detail the many flaws we find in the majority's approach. We will not repeat that entire discussion here, but rather we will summarize below the principles we consider controlling and will then apply those principles to the facts of this case.

I.

We stated in our *Loehmann's Plaza II* dissent that *Lechmere* must be understood in its setting. *Lechmere* presented the question whether the employer violated Section 8(a)(1) by denying nonemployee union representatives access to its property for the purpose of persuading the employer's unorganized employees to select the union as their bargaining representative. *Lechmere*'s holding is explicitly limited to "nonemployee organizational trespassing," 112 S.Ct. at 847, and its rationale is entirely dependent on the existence of organizational activity.

The *Lechmere* Court focused on the Section 7 right to self-organization guaranteed to employees. Nonemployee union organizers do not themselves possess this Section 7 right. Rather, Section 7 applies "only derivatively" to nonemployee union organizers because their role is essentially one of communicating information to the unrepresented employees. 112 S.Ct. at 846. However, where, as in *Loehmann's Plaza II* and the instant

case, nonemployee union representatives are engaged in area standards protests and appeals to the public, a different Section 7 right is involved (the right to engage in concerted activity for mutual aid and protection). In this context, the rights of the union representatives are not derivative of those of the audience they are trying to reach. "Rather, the rights of nonemployee union representatives engaged in nonorganizational Section 7 activities are their own rights or those that arise from their role as agents of employees who have *already* exercised their Section 7 right to select a labor organization as their representative." *Loehmann's Plaza II*, 316 NLRB No. 24, slip op. at 9 (dissenting opinion) (emphasis added). Therefore, *Lechmere*'s emphasis on derivative rights is wholly inapposite.

In addition, we pointed out in our *Loehmann's Plaza II* dissent that *Lechmere*'s rationale is largely grounded on the finite and easily identifiable nature of the audience that the nonemployee organizers were attempting to reach. The Court's analysis simply does not apply when the intended audience cannot be readily identified and is geographically diffuse, as in the case of a consumer boycott and area standards protest.

Accordingly, we stated in our *Loehmann's Plaza II* dissent that we would limit the *Lechmere* access analysis "to the circumstances to which the Court limited it in the *Lechmere* case itself: access by union organizers to an employer's property for the purpose of organizing that employer's employees." Id. at 11-12. In other access cases, we would apply the following test:

> [W]e would seek to determine in every case involving union protests which are directed at purposes other than organizing the employees of the employer on whose property the union is seeking access, whether the union representatives or members had reasonable alternative means of communicating their message to their intended audience. In making these

determinations, we would consider the nature of the audience to whom the message is targeted and the impediments which the union faces in getting its message to that audience without the access to the property which it is seeking. In addition, we would, in every case, factor in the nature and strength of the employer's property interest versus the importance of the Section 7 right asserted by the union. This is similar to the analysis which the Board applied to union protests which were directed at either the general or the consuming public prior to its *Jean Country* [291 NLRB 11 (1988)] analysis, and prior to *Lechmere*. [Id. at 12.]

II.

Turning to the facts of the instant case, the parties stipulated that the Respondent is the builder and developer of Crestwood Condominiums (Crestwood), a 288-unit residential condominium development located in Bristol, Pennsylvania. The Respondent owns the undeveloped common areas and the controlling interest in the condominium assocation, which, in turn, owns the developed common areas.

No public streets run through Crestwood: the two streets within the project, Leslie Drive and Norwalk Drive, are privately owned by the condominium association. Only one public street borders Crestwood: Oxford Valley Road, a two-lane thoroughfare that runs parallel to the project's southern border and has a 45-mile-per-hour speed limit. From Oxford Valley Road, automobiles may enter Crestwood one of two ways: (1) at the Leslie Drive entrance (the main entrance); or (2) at the Norwalk Drive entrance.

Crestwood's model home is located about 225 feet from the intersection of Oxford Valley Road and Leslie Drive. The model home is open 7 days a week from 10 a.m. to 6 p.m.

Construction of Crestwood's first 50 units was performed by union carpenters employed by a subcontractor. Thereafter, however, the Respondent hired carpenters directly and did not pay them prevailing union wages or benefits.

On April 1, 1990, union representatives engaged in peaceful handbilling on the walkway leading to, and on the sidewalk in front of, the Crestwood model home. The handbill stated:

> —This Is An Appeal To The General Public—
>
> LESLIE HOMES, INC.
>
> Employs foreign/immigrant workers at CRESTWOOD, who are paid substantially less than the prevailing wage and benefit standards in the area. LESLIE HOMES, INC. is destroying the fair wages and living standards of area tradesmen who return their earnings to the local economy by purchasing goods, services and housing, and by paying local and federal taxes.
>
> The great AMERICAN dream is fulfilled with the purchase of a home!
>
> Ask Yourself These Important Questions Before You Buy At CRESTWOOD . . .
>
> Will LESLIE HOMES, INC. Cut-Rate Pay Policy Result In A Discount In Your Purchase Price?
>
> Does Cut-Rate Craftsmanship Result From Cut-Rate Wages?
>
> Will The Units Be Adequately and Efficiently Heated and Air Conditioned?
>
> Will Cracks Appear In The Walls Immediately?
>
> Are These Apartments Properly Wired Or Will You Be Forever "Blowing A Fuse"?

Are The Entry Doors Strong And Secure?

Is There Hidden Shoddy Work That Could Cost You Money And Grief After You Buy?

EXERCISE CAUTION BEFORE SIGNING AN AGREEMENT OF SALE.

Protect the American Dream—Don't Buy At Crestwood

THE METROPOLITAN DISTRICT COUNCIL OF CARPENTERS OF PHILADELPHIA AND VICINITY

Thanks You For Your Support

Also on April 1, 1990, the Respondent advised the handbillers that they were on private property and directed them to leave the premises, but they refused. The Respondent summoned the Bristol Township Police, who initially concluded that the handbilling was proper and refused to interfere with it. However, the Respondent's president then telephoned the Buck's County District Attorney's Office. Thereafter, the police advised the union representatives that the district attorney had concluded that they were subject to removal and arrest if they remained on the property.

III.

Applying our access analysis to the facts of this case, we would find that the Union had no reasonable nontrespassory means of communicating its area standards protest to its intended audience. The Union's message was directed at a diverse population, potential purchasers of Crestwood condominiums, a group which is not readily identifiable and thus could not reasonably be reached away from Crestwood by direct personal contact, telephone, or mail. The Union should not be required to undertake the burden and expense of a public media campaign when there is no reasonable expectation that such a campaign would even reach its intended audience.

The majority contends that the Union possessed reasonable alternative means of communicating its message to potential home buyers because it could have picketed or placed signs on the strip of public property between Oxford Valley Road and Crestwood, and could have attempted to give handbills to motorists leaving Crestwood at the intersection of Leslie Drive and Oxford Valley Road. We find these purported alternatives illusory and wholly inadequate.

The message the Union was attempting to communicate was relatively detailed. The Union sought to give potential purchasers information to guide their decision as to whether they should purchase a home from the Respondent. The Union wanted to inform potential purchasers that the Respondent was paying workers on the project below the area standards and that the Respondent's conduct adversely affected other area employees, the local economy, and tax revenues. The Union's handbill emphasized the importance of the home buying decision. The Union advised the potential purchaser to consider seven specific questions before signing an agreement of sale at Crestwood. The handbill concluded with an appeal not to buy at Crestwood and with a statment of the Union's name.

All this information could not be fully contained on a picket sign or other sign that could be read and understood by motorists traveling at 45 miles per hour along Oxford Valley Road or negotiating the approximately 90-degree turn into Crestwood. A more detailed statement, such as the handbill, was necessary to impart the full message.[1]

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[1] See the Board's original decision in *Loehmann's Plaza I*, 305 NLRB 663, 667 (1991), in which the Board similarly found that a detailed area standards message set forth in a union leaflet "could not be fully contained on a picket sign." See also *Sentry Markets v. NLRB*, 914 F.2d 113, 117 (7th Cir. 1990) ("picket signs could not contain all the information the Union wished to disseminate").

In concluding otherwise, the majority errs in belittling the information the Union sought to communicate and in reading too much

The majority's suggestion that the Union could have distributed handbills to prospective home buyers departing Crestwood on Leslie Drive is equally unavailing. Although there is a stop sign at the Leslie Drive exit onto Oxford Valley Road, motorists stopping there are still on Crestwood property. Thus, handbillers would have to trespass on Crestwood property in order to handbill such motorists. In addition, union representatives who step into Leslie Drive at the stop sign to proffer handbills to motorists would subject themselves to the danger of being struck by exiting vehicles, particularly because Leslie Drive has two lanes exiting onto Oxford Valley Road (one for vehicles turning right and one for vehicles turning left). A handbiller approaching the driver-side window of a car in the right-turn lane would risk being struck by a vehicle advancing in the adjacent left-turn lane. Similarly, a handbiller approaching the passenger-side window

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into *Red Food Stores*, 296 NLRB 450 (1989), a case that is factually distinguishable. In *Red Food Stores*, unlike here, the union handbilled and picketed at the public perimeters of the respondent's stores for approximately 3 months. Although the union contended that it could not effectively handbill from the perimeters, the Board compared the union's picket signs to the union's handbill and found that they addressed the same subjects. The record did not show that customers were unable to read the picket signs as they entered the stores' parking lots. In addition, in *Red Food Stores*, unlike here, while the picketing and handbilling were on going, the union conducted an extensive media campaign. The Board emphasized that although it would be "reluctant to impose the cost of a media campaign on a union, the Union here in fact utilized a media campaign." Id. at 453. On the basis of all these considerations, the Board concluded that the General Counsel did not meet his burden of showing that the alternatives actually employed by the union were not effective.

Contrary to the majority's apparent contention, *Red Food Stores* did not establish a broad rule that an area standards message is "essentially simple" and can always be contained on a picket sign. As noted above, the Board held to the contrary in the subsequent case of *Loehmann's Plaza I*.

of a car in the left-turn lane would risk being struck by a vehicle advancing in the adjacent right-turn lane.

Handbilling motorists leaving Crestwood would also be ineffective because, contrary to the majority, home buyers may well have already made their purchase by that time. These individuals may be purchasing a condominium on their first visit or they may be returning to Crestwood after having inspected the project on a prior occasion when no union representative was present. In either case, handbilling such home buyers when they leave Crestwood has little chance of conveying the Union's message to them at a time when they might still heed it.

The conclusion we would reach is further supported by an examination of the nature and strength of the employer's property interest versus the importance of the Section 7 right asserted by the Union. The Respondent offers condominium units for sale to members of the public generally. For 8 hours a day, 7 days a week, the Respondent opens to the public the walkway leading to, and the sidewalk in front of, the model home. Especially in view of the peaceful nature of the handbilling and the total absence of evidence of interference with ingress or egress at the model home, the fact that the public is invited onto the premises significantly diminishes the strength of the Respondent's property interest.

The majority concedes, as it must, that the area standard activity in which the Union engaged is protected by Section 7 of the Act. Indeed, in our *Loehmann's Plaza II* dissent, we cited to and quoted from *Giant Food Markets*, 241 NLRB 727 (1979), enf. denied on other grounds 633 F.2d 18 (6th Cir. 1980), as a leading case articulating the protected nature of area standards activity and the crucial role it plays in advancing the interests of represented employees. When the union representatives engaged in that activity here, they were exercising their own Section 7 rights and those of the employees whom they are

authorized to represent. In our view, the interest of the Union and its members in publicizing its assertion that the Respondent was undercutting negotiated area standards outweighs the Respondent's diminished property interest.

IV.

In sum, we conclude that neither the use of picket signs or other signs along Oxford Valley Road, nor the handbilling of motorists departing Crestwood, constitutes a reasonably effective alternative means for the Union to communicate its message to potential purchasers of Crestwood condominiums. In contrast, the Union's distribution of handbills on the walkway leading to, and on the sidewalk in front of, the Crestwood model home impinged only modestly on the Respondent's property rights, because the union representatives were located in an exterior area to which the Respondent invited the public. Accordingly, we would find that the Respondent violated Section 8(a)(1) of the Act by refusing to permit the union representatives to engage in peaceful handbilling at this location and by summoning the police to have them removed from the property.

Dated, Washington, D.C. January 25, 1995

Margaret A. Browning, Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

Supreme Court, U.S.
FILED
MAY 30 1996
CLERK

(3)

No. 95-1760

In The

Supreme Court of the United States

October Term, 1995

International Brotherhood of Teamsters, AFL-CIO, Local No. 243,

Petitioner,

v.

National Labor Relations Board, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONDENT MACOMB MALL ASSOCIATES' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the National Labor Relations Board err as a matter of law when it interpreted *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) as barring nonemployee union representatives access to private property for purpose of consumer boycott handbilling, when the union failed to establish that it confronted unique obstacles to nontrespassory communications with the target audience?

LIST OF PARTIES TO THIS PROCEEDING

Petitioner, International Brotherhood of Teamsters, AFL-CIO, Local No. 243; *Petitioner,* United Food and Commercial Workers Local 880; *Respondent,* National Labor Relations Board; *Respondent,* Macomb Mall Associates; *Respondent,* Sears, Roebuck & Co.; *Respondent,* Oakland Mall Ltd.; *Respondent,* Chamber of Commerce of the United States of America.

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*Authorities upon which we chiefly rely are marked with asterisks.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is officially reported at 74 F.3d 292, and is reprinted in the separately-bound Appendix to the Petition (Pet. App. 1a-17a). The Supplemental Decision and Order of the National Labor Relations Board at issue in this matter is officially reported at 316 NLRB 1160, and is reprinted at Pet. App. 18a-67a. The original decision of the NLRB in this matter is officially reported at 304 NLRB 832, and is reprinted at Pet. App. 68a-80a.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was issued on January 26, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(1) provides in pertinent part:

> [Sec. 8(a)] It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this Act.

STATEMENT OF THE CASE

Oakland Mall II[1] results from a number of attempts by agents representing Local 243, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of American, AFL-CIO, ("Union"), to distribute handbills to customers entering a Sears, Roebuck and Co. ("Sears") store located adjacent to the Macomb Mall in Roseville, Michigan for the purpose of advocating a total consumer boycott of Sears. The Union alleges that Macomb Mall Associates, a Michigan Limited Partnership ("Macomb Mall"), violated Section 8(a)(1) of the National Labor Relations Act ("Act") by "interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act . . . "

In this case, Sears owned its property and, on at least two occasions, on or about August 9 and September 6, 1988, summoned Roseville police for assistance to remove Union representatives from Sears' entrances to its own store.

Upon being denied access to the Sears' entrances, on August 9, the Union agents moved to the interior of the Macomb Mall near the mall's entrance to Sears and began distributing handbills. Macomb Mall management, after learning about the activity, contacted Greg Lowran of the Union and explained that the proper procedures for access to the mall would have to be followed, as with any other requests, and that handbilling could not continue

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[1] U.S. Court of Appeals for the District of Columbia Circuit Case No. 95-1260 ("Oakland Mall II").

until the requirements were fulfilled.[2] Macomb Mall does not permit interim access while an application is pending.

Various conversations took place between the Macomb Mall management and Greg Lowran, who was in charge of the on-site activities of Local 243, regarding the application process. In fact, Lowran actually filled out two of the application forms (the registration application and the rules and regulations with respect to vending or solicitation or petitioning). However, the remaining documents were never completed, nor was proof of insurance coverage provided. At no time did the Union indicate particular problems with the application process, nor did

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[2] Macomb Mall allows all entities wishing to engage in non-consumer activity to apply for access, and it has a strong interest in the uniform enforcement of its policy. Various organizations make inquiries for access to the mall premises for vending, solicitation or petitioning. Mall management provides these entities with a packet of materials. The packet contains various documents, including an explanatory sheet regarding the mandatory insurance coverage, an "exhibit standards" form, a hold harmless and indemnification agreement, an event coordination list, a registration application, and rules and regulations with respect to vending, soliciting or petitioning. Additionally, Macomb Mall policy requires all groups to provide insurance coverage. The insurance coverage, generally accomplished by Macomb Mall's being named as an additional insured on the visiting organization's policy, assures protection for all potential damages that may result to third parties due to the activities of the visiting entity.

After the group has completed the necessary forms and provided proof of insurance, Macomb Mall schedules the event. Macomb Mall does not discriminate against any organization.

it state that any of the requirements posed an insurmountable or unreasonable barrier to its ability to comply.

On September 6, two men from the Union began distributing handbills at Macomb Mall's interior entrance to Sears with absolutely no prior notification to or consent by Macomb Mall management. A representative of Macomb Mall told the individuals that the handbilling would have to cease because the Union had not complied with the procedural requirements for solicitation on the mall premises. Again, the Union was provided with the packet of materials.

The Union handbillers subsequently left the mall premises. Thereafter, the Union filed the instant unfair labor practice charge against Macomb Mall and Sears.

Following a three-day hearing, an administrative law judge found that Sears and the Macomb Mall had violated the Act. In a decision issued August 27, 1991, the National Labor Relations Board ("Board"), applying the then-current test as set forth in *Jean Country*, 291 NLRB 11 (1988), affirmed the administrative law judge's decision.

Sears and the Macomb Mall filed petitions for review in the U.S. Court of Appeals for the District of Columbia Circuit ("Court of Appeals") and the Board filed a cross-application for enforcement of its order. During this time period, this Court decided *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). In *Lechmere*, the Court ruled that the Board's *Jean Country* approach to resolving property access cases was not "consistent with" *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956).

Following *Lechmere*, the Court of Appeals, on joint motion of the parties, remanded this case to the Board for reconsideration in light of *Lechmere*. The Board, on remand, invited the parties in this case, as well as the parties in a number of other like cases that were remanded after *Lechmere*, to submit supplemental statements of position on the implications of *Lechmere*.

On January 25, 1995, the Board issued its decision in *Leslie Homes, Inc.*, 316 NLRB No. 29, *pet. for review pending sub nom. Metropolitan District Council of Carpenters v. NLRB*, No. 95-3086 (3rd Cir.) (Pet. App. 81a), the first post-*Lechmere* case to be decided by the Board. The Board ruled that *Lechmere* requires the Board to apply the rule in *Babcock* "outside the organizing context," 316 NLRB at 128, to cases in which union representatives seek to distribute handbills on private property for consumer boycott purposes.

Three months after deciding *Leslie Homes*, the Board issued its decision, *Oakland Mall II*, dismissing the complaint. On June 21, 1995, the Union filed a petition for review with the Court of Appeals.[3] The Union's petition was consolidated with a petition filed by Local 880 of the United Food and Commercial Workers, which sought to review another decision by the Board on facts similar to those in this case. On January 28, 1996, the Court of Appeals issued its decision in this matter affirming the

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[3] On August 16, 1995, the Court of Appeals granted the motions of Sears and Macomb Mall for leave to intervene, and the motion of the Chamber of Commerce of the United States of America for leave to participate as amicus curiae.

Board's application of *Lechmere* to these consolidated cases

On April 25, 1996, the Union filed its petition for a writ of certiorari before this Court, which was placed on the docket April 30, 1996.

SUMMARY OF ARGUMENT

The Board in this case properly applied this Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). In *Lechmere*, the Court reaffirmed its decision in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), which generally serves to prohibit nonemployee access to private property for union organizing activity. The Board below held that *Lechmere* was not limited in scope to union organizing activity, and that nonemployees may not trespass onto private property to engage in union activity of any kind absent a showing of "unique obstacles" to nontrespassory communications, such as employees "isolated from the ordinary flow of information that characterizes our society." (Pet. App. 29a) (citing *Lechmere*, 502 U.S. at 540). The Court of Appeals correctly affirmed the Board's decision.

Had the Board applied a multifactor balancing approach to the issue of union access to private property, as set forth in *Jean Country*, 291 NLRB 11 (1988), the result would have been untenable. Property owners would be faced with a set of inconsistent guidelines requiring them to give greater access to union representatives implementing a consumer boycott than to union representatives seeking access for the purpose of helping non-

unionized workers to organize under the Act. As the Court of Appeals noted below, such a result would conflict with years of case law precedent:

> [A] long history of cases manifests a hierarchy among section 7 rights, with organizational rights asserted by a particular employer's own employees being the strongest, the interest of non-employees in organizing an employer's employees being somewhat weaker, and the interest of uninvited visitors in undertaking area standards activity, or otherwise attempting to communicate with an employer's customers, being weaker still.

(Pet. App. 12a-13a) (Citations omitted). Given the overall purpose and structure of the Act, the Board's decision in this case to apply *Lechmere* to the issue of union access to private property for consumer boycott handbilling was correct.

Because the Court of Appeals affirmed the Board's decision denying relief to the Union, it is unnecessary for this Court to grant certiorari in this case. Macomb Mall requests, therefore, that this Court deny the Union's Petition for Writ of Certiorari in this matter.

ARGUMENT

I. Lechmere

The issue in this consolidated matter concerns the proper interpretation and application of the United States Supreme Court's decision in *Lechmere, Inc. v. NLRB*, 502

U.S. 527 (1992), including its application in cases involving union access to private property for a non-organizing purpose. This case concerns union access to private property for the purpose of consumer boycott handbilling. *Lechmere* was decided by the Supreme Court in 1992 following a variety of Board and federal court decisions concerning union access to private property.

In *Lechmere*, the Supreme Court reaffirmed the rule of *NLRB v. Babcock & Wilcox, Co.*, 351 U.S. 105 (1956), which generally permits an employer to prohibit nonemployee distribution of union organizational literature on its property. (502 U.S. at 538). Pursuant to *Babcock*, nonemployee union organizers may be prohibited from entering private property unless "the accessibility of employees makes ineffective the reasonable attempts by [the] non-employees to communicate with them through the usual channels." (*Id.* at 537). "It is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights. . . . " (*Id.* at 538). Under *Babcock*, the "union's burden of establishing such isolation is . . . 'a heavy one,' [cites omitted], and one not satisfied by mere conjecture or the expression of doubts concerning the effectiveness of nontrespassory means of communication." (*Id.* at 540).

The Supreme Court in *Lechmere* addressed union organizers' attempt to gain access to a retail store located on private property in a large metropolitan area in an attempt to communicate with the employees of the store and organize them. Because the union in *Lechmere* failed to establish "unique obstacles" to communicating with the store's employees, who did not reside on the store's

premises, the Supreme Court held that their employer was entitled to prohibit the union from entering the premises. (*Id.* at 540).

In *Oakland Mall II*, the Board was faced with deciding, among other things, whether *Lechmere's* general rule prohibiting nonemployee access to private property applied to a union's attempt to gain access to Macomb Mall, a private shopping mall, for consumer boycott handbilling directed at the customers of Sears. The purpose of the handbilling was not related to union organizing attempts at Sears or anywhere else.

II. The Board's Decision in Oakland Mall II

For guidance in evaluating the rights of the union handbillers to gain access to the shopping centers in question, the Board in *Oakland Mall II* looked to *Lechmere*, as that decision had been interpreted by the Board in *Leslie Homes, Inc.* (Pet. App. 81a). The Board held as follows:

> On reconsideration of *Oakland Mall I* in light of *Lechmere*, the statements of position of the parties, the briefs of the amici curiae, and our recent decision in *Leslie Homes, Inc.*, we have decided to overrule certain of our unfair labor practice findings in *Oakland Mall I* and to dismiss those allegations against Respondents Sears and Macomb Mall.

(*Oakland Mall II*, Pet. App. 20a) (emphasis added). The Board's reliance on *Leslie Homes* in *Oakland Mall II* was significant to its decision in this matter because, in *Leslie Homes*, the Board also considered and rejected many of the arguments brought by the Union in the support of its Petition.

A. Leslie Homes

In *Leslie Homes,* the Board evaluated whether union representatives were authorized under § 7 of the Act to gain access to a new private condominium complex for the purpose of distributing handbills notifying potential purchasers of the fact that the condominiums had been built using non-union, allegedly sub-standard labor. Citing *Lechmere's* emphasis on the importance of property rights, its rejection of the multifactor balancing test of *Jean Country* and its unequivocal return to the rule in *Babcock,* the Board held that the union handbillers could be lawfully prohibited from entering the condominium complex. The Board held that the rule in *Babcock* was not limited in scope to situations involving nonemployee access to private property simply for organizing activities. (Pet. App. 81a). The Board reasoned that the Supreme Court's strong reaffirmation of the general rule of *Babcock* in *Lechmere* signaled that *Babcock* should continue to be applied outside the organizing context. (*Id.*)[4] Applying the *Lechmere/Babcock* analysis, the Board noted that "reasonable alternative means were available to the

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[4] Chairman Gould, who filed a concurring opinion in *Leslie Homes,* conceded that the decision in *Lechmere* was definitive insofar as it:

> creates no distinction and sends no 'signal' that union efforts to reach customers and the public ought to be treated differently from the [union organizing] initiatives undertaken in *Lechmere* itself. Under the circumstances of this case, the reasoning employed in *Lechmere* applies, and, therefore, I am required to join and concur in the opinion of Members Stephens and Cohen. If there is to be a different result, it must come from the President and the Congress and not the Board. (*Id.* at 131).

union for communicating its area standards message to potential customers of [the condominium complex] and, a fortiori, that it [had] failed to carry its burden of showing the absence of such means." (*Id.* at 131). Thus, the Board in *Leslie Homes* interpreted the *Lechmere/Babcock* rule as applying to nonemployee access to private property for area standards handbilling. (*Id.* at 127-28).

B. Oakland Mall II

In following *Leslie Homes*, the Board in *Oakland Mall II* found that the handbillers in this case were "non-employees" because they were neither employees of any of the employers whose property interests are at issue in this case nor employees with any rights to enter the property in the course of their employment under a sub-contract. (*Oakland Mall II*, Pet. App. 27a n.12).[5]

In concluding that the handbillers in this matter were nonemployees, the Board reasoned as follows:

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[5] The Board's conclusion regarding the status of the union handbillers in this case is especially appropriate with respect to Macomb Mall, whose relationship to the handbillers was almost non-existent. The handbillers were mostly former Ryder truck driver employees, who were terminated following Sears' decision to contract with a non-union trucking company. None of the handbillers had any employment relationship whatsoever with Macomb Mall, its tenants or Sears. The handbilling activity undertaken at the mall was simply aimed at convincing Sears' customers not to shop at Sears because of Sears' termination of the Ryder contract. To maximize their effectiveness, the handbillers wished to place themselves directly in front of the entrances to Sears, including the entrance to Sears inside of Macomb Mall.

> The fact remains that the Union represents no employees who have a present connection to any employer with an interest in the property or employees who have any claim to having been unlawfully terminated by such an employer. The *Lechmere/Babcock* general rule, as well as its inaccessibility exception, would indisputably apply were the Union to seek to organize the employees of Leaseway, who are now performing the work formerly contracted to Ryder. But the Union has expressed no such intent. Because Sears is a neutral with respect to the labor relations of independent contractors such as Leaseway and Ryder, pressure on Sears to cease doing business with Leaseway and recontract with Ryder is secondary pressure. *It would be anomalous to permit greater leeway respecting trespass for this kind of activity than for the primary activity of organizing a property owner's own employees.*

(*Oakland Mall II*, Pet. App. 27a n.13) (emphasis added). It is significant to note that the Board reached the same conclusion on this issue in *Leslie Homes*,[6] and that the Board in *Oakland Mall II* specifically relied on *Leslie Homes* in reaching its decision.[7]

III. The Court of Appeals' Decision in Oakland Mall II

The Court of Appeals reviewed and affirmed the Board's decision in *Oakland Mall II*. It reasoned in pertinent part:

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[6] *See Leslie Homes, Inc.*, Pet. App. 98a.

[7] *See Oakland Mall II*, Pet. App. 20a.

> At heart, this case is a simple one. *Babcock* establishes (and *Lechmere* reaffirms) a general rule under which an employer may deny access to nonemployees seeking to trespass on the employer's property. In the cases at hand, petitioners' activities involved the trespass of nonemployees onto employers' properties, in response to which the employers barred them access.
>
> No recognized right under section 7 has been shown to apply; therefore, the employers' actions were not unlawful under the NLRA. There should be no more to the matter than that. However, petitioners attempt to obfuscate this straightforward analysis by proffering artificial distinctions between the section 7 rights asserted in *Babcock* and *Lechmere,* and those being asserted here.

(Pet. App. 1a). The Court of Appeals found, "as have the other circuits that have considered the issue, that *Lechmere* does not create a distinction between the strengths of derivative and nonderivative section 7 rights." (*Id.* at 14a) (Citations omitted). Rejecting the Union's arguments, the Court of Appeals reasoned as follows:

> Supreme Court precedent clearly establishes that, as against the private property interest of an employer, union activities directed at consumers represent weaker interests under the NLRA than activities directed at organizing employees. *A long history of cases manifests a hierarchy among section 7 rights, with organizational rights asserted by a particular employer's own employees being the strongest, the interest of nonemployees in organizing an employer's employees being somewhat weaker, and the interest of uninvited*

> *visitors in undertaking area standards activity, or otherwise attempting to communicate with an employer's customers, being weaker still.* Thus, "[u]nder the § 7 hierarchy of protected activity imposed by the Supreme Court," nonemployee activity in which "the targeted audience was not [an employer's] employees but its customers" "warrants even *less* protection than the non-employee organizational activity."

(Pet. App. 12a-13a) (Citations omitted). The Court of Appeals held that, "although *Babcock* and *Lechmere* were organizational cases, the reasoning therein is equally applicable in any situation where the exercise of a section 7 right requires communication of a message to a target group." (*Id.* at 15a) (Citation omitted).

Applying the rule in *Lechmere/Babcock* to this case, the Court of Appeals completed its analysis by noting that the Union had not satisfied its "heavy burden" of establishing the inaccessibility of its target group from nontrespassory methods of communication, and thus was not entitled to access to the shopping center properties for purposes of its consumer boycott handbilling. (*Id.* at 17a).[8]

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[8] This finding in *Oakland Mall II* was especially appropriate with respect to Macomb Mall, which is in a unique factual situation in comparison to the other parties in this matter. Even if it had attempted to do so, the General Counsel would have had a difficult time showing the union lacked reasonable alternative means for communicating its message to the customers of Sears without trespassing on Macomb Mall's property. Indeed, the record shows that Sears – which owned its building adjacent to Macomb Mall – had seven exterior entrances to its store through which approximately 80% of Sears' customers entered (*Oakland Mall II*, Pet. App. 22a-23a).

The Board's application of the rule in *Babcock* to this consumer boycott handbilling case, as affirmed by the Court of Appeals, is correct as a matter of law. It should, therefore, not be reviewed by this Court.

IV. The Jean Country Multifactor Balancing Approach was Rejected by this Court in Lechmere

By opposing the application of the *Babcock* rule to this case, the Union is attempting to resuscitate the multifactor balancing method of governing union access to private property that was put to rest by this Court in *Lechmere*.[9] In *Lechmere*, this Court declared in pertinent part:

> Hudgens did not purport to modify *Babcock*, much less to alter it fundamentally in the way *Jean Country* suggests. . . .
>
> So long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place. It is *only* where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights as described in the Hudgens dictum. (Citations omitted). At least as applied

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[9] In many ways, the Union's Petition is surprising, given its admission that *Lechmere* announced a return to the straightforward approach announced in *Babcock*. *See Petition*, at 15 ("In *Lechmere*, the Court provided an entirely new synthesis of its decisions mediating the conflict between NLRA § 7 and state property law – one which eschewed the balancing test of prior opinions and substituted a categorical rule. . . . ")

> to nonemployees, *Jean Country* impermissibly conflates these two stages of the inquiry – thereby significantly eroding *Babcock*'s general rule that "an employer may validly post his property against nonemployee distribution of union literature." (Citation omitted). We reaffirm that general rule today, and reject the Board's attempt to recast it as a multifactor balancing test.

(117 L. Ed. 2d 92). The Union's Petition in this case must be rejected, because it calls for the Court to apply the *Jean Country* multifactor balancing test that was rejected by this Court in *Lechmere*. To find otherwise would potentially bring about what the Court of Appeals has deemed a "perverse" result,[10] in which union representatives seeking access to private property to organize workers would be governed by a rule (*Lechmere*) that is more restrictive than the rule (*Jean Country*) that would apply to union representatives seeking access to private property for other non-organizational purposes, including consumer boycott handbilling. Such a result is inconsistent with the Act.

In sum, *Lechmere* rejected the balancing approach to property rights set forth in *Jean Country*, and a return to this approach is unwarranted.

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[10] Pet. App. 16a.

V. The Rule in Lechmere/Babcock is Especially Appropriate With Respect to Macomb Mall

It is important to point out to this Court that the Board's application of the *Lechmere/Babcock* rule to Macomb Mall is especially appropriate given the attenuated nature of Macomb Mall's connection to the underlying labor dispute – neither Macomb Mall, nor its tenants or Sears (which owns its building adjacent to the mall), have any relationship whatsoever with the union that sponsored the handbilling activity. Even more importantly, unlike Sears, Macomb Mall never even prohibited the union from handbilling on its property. It simply required of the handbillers what it requires of all solicitors visiting the mall: (1) a completed application describing the proposed activity; (2) an executed "Hold Harmless and Indemnification Agreement;" (3) an executed agreement to abide by the rules established by Macomb Mall for such activities; and (4) a certificate of insurance similar to that required of the mall's commercial tenants establishing that the mall had been named as an additional insured under a liability policy carrying a minimum coverage of $500,000 for each occurrence of bodily injury. (*Oakland Mall II*, Pet. App. 23a). Given the unique factual position of Macomb Mall in this matter, The Board's decision in this matter was especially appropriate.

Macomb Mall was permitted under the law to reasonably and without discrimination restrict the Union's handbilling activity by insisting that the Union comply with the mall's solicitation/access policy.[11] Since Macomb

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[11] *Cf. McDonnell Douglas Corp. v. NLRB*, 472 F.2d 539, 547 (8th Cir. 1973) (employer can interfere with the distribution of

Mall's solicitation/access policy was based on important interests, including safety considerations, and was reasonably applied to the Union without discrimination, the Board's decision that the Union was not entitled to access was appropriate, and should not be reviewed by this Court.

CONCLUSION

For all of the above reasons, Macomb Mall requests that this Court deny the Union's Petition for a Writ of Certiorari in this matter.

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union literature to the extent necessary to maintain production, discipline, security or other important interests); *NLRB v. Malta Construction Co.*, 806 F.2d 1009, 1011 (11th Cir. 1986) (interference with union activity may be justified based on special circumstances to maintain production or discipline or to ensure safety); *All-Glass Aquarium Co. Inc. v. NLRB*, 214 NLRB No. 24 (1974) (access rule is valid if it is not disparately applied against union activities).